No. 15035

United States
Court of Appeals
for the Ninth Circuit

INTERMOUNTAIN EQUIPMENT COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record

Petition for Review and Petition for Enforcement of Order of National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-1-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

LOUIS H. CALLISTER,
NATHAN J. FULLMER,
619 Continental Bank Bldg.,
Salt Lake City, Utah;

THOMAS L. SMITH,
319 Broadway,
Boise, Idaho,

For Petitioner, Intermountain Equipment Co.

MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board,
Washington 25, D. C.,

For Respondent, National Labor Relations Board.

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 19-CA-948.
Date Filed: 1-11-54.
Compliance Status Checked By: 3-31-54.

Important—Read Carefully

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought—

Name of Employer:
Intermountain Equipment Company.

Address of Establishment:
415 Broadway Avenue, Boise, Idaho.

Number of Workers Employed:
33.

Nature of Employer's Business:
Sells Heavy Equipment.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (89a) and 1 of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Bases of the Charge—

Historically, the Company has been paying bonuses to all employees for the past several years. On or about December 24, 1953, the Company paid bonuses to all employees of Employer, except employees members of this Union in the bargaining unit of an election that was held on June 18, 1953, by the National Labor Relations Board. In negotiations, a bonus was discussed and we were told by the Employer that if any bonuses were paid to any employees, all employees would receive the same.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

General Teamsters, Warehousemen & Helpers, Local Union 483.

4. Address:

613 Idaho Street, Boise, Idaho.
Telephone No. 3-5439.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

6. Address of National or International, if any:

100 Indiana Avenue, N.W., Washington 1, D.C.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ F. T. BALDWIN,
Secretary-Treasurer.

Date: January 7, 1953.

Willfully False Statements on This Charge Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80).

[Received in evidence as General Counsel's Exhibit No. 1-A, September 28, 1954.]

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 19-CA-948, Amended.
Date Filed: 1-11-54, Amended 3-8-54.
Compliance Status Checked By:

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a

complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought—

Name of Employer:
Intermountain Equipment Company.

Address of Establishment:
415 Broadway, Boise, Idaho.

Number of Workers Employed:
App. 33.

Type of Establishment (Factory, mine, wholesaler, etc.):
Heavy Equipment.

Identify principal product or service:
Heavy Equipment.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1), (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

During negotiations on July 22nd and 23rd, 1953, after certification following an NLRB election, the Company refused to include a Bonus clause in the Working Agreement, but stated that if a Bonus was paid to the employees not included in the Bargaining Unit, that such employees would also be paid a bonus or that if they paid any employees a bonus they would pay all a bonus in keeping with their past practice. On or about December 24, 1953, the Company paid the employees not in the bargaining unit a bonus, but did not pay those employees included in the Bargaining Unit a bonus.

During the above-mentioned negotiations, the Union sought to include in the Working Agreement a provision for Sick Leave. The Company stated they were opposed to the inclusion of a sick leave clause because employees would be inclined to take the number of days included in the agreement whether sick or not. The Company agreed that they would continue to grant sick leave even as they had in the past, however, the Company has failed to grant the employees in the Bargaining Unit sick leave while continuing to grant sick leave to the other employees, all the above actions are designed to convince the employees included in the Bargaining Unit that they would be better off without the undersigned Union as their

Bargaining Representative in violation of Section 8 (a) (1), (3) and (5) of the Labor Management Relation Act of 1947.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

General Teamsters, Warehousemen & Helpers Local Union 483.

4. Address:

208 No. 16th Street, Boise, Idaho.
Telephone No.: 3-5439.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit:

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

6. Address of National or International, if any:

100 Indiana Ave., N.W., Washington 1, D. C.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ F. T. BALDWIN,
Secretary-Treasurer.

Date: 3-5-54.

Willfully False Statements on This Charge Can be punished by Fine and Imprisonement (U.S. Code, Title 18, Section 80).

[Received in evidence as General Counsel's Exhibit No. 1-C, September 28, 1954.]

United States of America
Before the National Labor Relations Board

Case No. 19-CA-948

INTERMOUNTAIN EQUIPMENT COMPANY,

and

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 483.

COMPLAINT

It having been charged by General Teamsters, Warehousemen and Helpers, Local Union 483, that Intermountain Equipment Company, herein called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Intermountain Equipment Company is, and at all times material hereto has been a corporation duly organized and existing by virtue of the laws of the State of Idaho, with its principal office and place of business in Boise, Idaho.

II.

Respondent operates branches in the cities of Spokane, Washington; and Pocatello, Idaho. In the course and operation of its business the Respondent annually purchases merchandise valued in excess of two and one-half million dollars, 95 per cent of which is shipped directly to the Respondent from states of the United States other than the State of Idaho. During the course and operation of its business Respondent sells merchandise valued in excess of $3,200,000, 25 per cent of which merchandise is sold and shipped to states of the United States other than the states in which it is sold. Respondent is engaged in interstate commerce within the meaning of the Act.

III.

General Teamsters, Warehousemen and Helpers, Local Union 483, is and, at all times material hereto, has been a labor organization within the meaning of Section 2 (5) of the Act.

IV.

On or about June 26, 1953, the Union was certified by the Board as the collective bargaining representative of the employees in the following unit:

All warehouse employees of Intermountain Equipment Company, construction machinery, equqipment and parts sales and service plant in Boise, Idaho, including warehousemen, shipping and receiving clerks, price clerks, countermen, order clerks, delivery men, inventory clerks and warehouse filing clerks, excluding all managers, assistant managers, foremen, confidential secretaries, office clerical employees, outside salesmen, professional employees, guards and supervisors as defined in the Act.

V.

On or about the 27th day of July, 1953, Respondent and the Union entered into a contract covering the employees in the above unit which contract omits mention of sick leave, or annual bonuses to employees.

VI.

During the course of bargaining which culminated in the contract as set forth above, the Union demanded that provisions for sick leave and for the continuation of bonus payments to all employees be written into the contract. Respondent refused said demand, but orally agreed that in the event any bonuses were to be paid to employees that all employees including employees in the unit above would be paid bonuses without discrimination as in the past and that sick leave would be granted all employees without discrimination as in the past.

VII.

Relying upon the oral agreement entered into with Respondent, as set forth in paragraph VI above, the negotiators for the Union withdrew their demand that bonuses and sick leave provisions be embodied in the contract and entered into a contract with Respondent as set forth in paragraph V above.

VIII.

Since July 27, 1953, and at various times since, employeees in the unit as set forth in paragraph IV above, have at various times lost wages because of sickness for which sick leave was not paid.

IX.

On or about December 25, 1953, Respondent paid bonuses to substantially all of its employees who are not members of the Union nor in the unit as set forth in paragraph IV above, but did not pay bonuses to those of its employees who were members of the Union or were in the units as set forth above and failed and refused to pay to these employees in the unit the customary Christmas bonus paid annually to all employees of Respondent.

X.

Since on or about December 25, 1953, at various times, the Union, through its officers and agents requested Respondent to pay the Christmas bonus to all employees without discrimination and to pay sick leave to employees within the unit without discrimination, and Respondent has at all times failed and refused to do so.

XI.

By the acts described above in paragraphs VIII, IX and X, Respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all of said acts, and each of them, Respondent has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (A) (1) of the Act.

XII.

By the acts described above in paragraphs VIII, IX, and X, and by each of them, Respondent did discriminate against its employees in the exercise of their rights guaranteed in Section 7 of the Act and by all of said acts, and each of them, Respondent has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

XIII.

By the acts described above in paragraphs VIII, IX and X, and by each of them, Respondent did refuse and fail to bargain with the Union as the representative of its employees in the appropriate unit set forth above in paragraph IV, and thereby has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

XIV.

The activities of Respondent, as set forth and described above in paragraphs V through XIII occurring in connection with the operations of Respondent, as described above in paragraphs I and

II, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XV.

The aforesaid acts of Respondent constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3) and (5), and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 7th day of September, 1954, issues this Complaint against Intermountain Equipment Company, the Respondent herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19.

Received in evidence as General Counsel's Exhibit No. 1-F, September 28, 1954.

[Title of Board and Cause.]

RESPONDENT'S ANSWER TO COMPLAINT

Answering the complaint issued by the Regional Director for the Nineteenth Region of the National Labor Relations Board upon charges by General Teamsters, Warehousemen and Helpers, Local Union 483, that Intermountain Equipment Company, herein

called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, Respondent admits, denies and alleges as follows:

I.

Answering Paragraph I of the complaint, Respondent admits the allegations thereof.

II.

Answering Paragraph II of the complaint, Respondent admits for the purpose of this complaint that it is engaged in interstate commerce within the meaning of the Act; but it alleges that its business operations and plants located in cities other than Boise, Idaho, and operations relative thereto, have no application in the establishment of the jurisdictional qualifications of the Board, nor are such operations and plants related in any manner to the bargaining unit which has made the charges upon which the complaint herein has been issued.

III.

Answering Paragraph III of the complaint, Respondent admits the allegations thereof.

IV.

Answering Paragraph IV of the complaint, Respondent admits the allegations thereof.

V.

Answering Paragraph V of the complaint, Respondent admits the allegations thereof.

VI.

Answering Paragraph VI of the complaint, Respondent admits the allegations of the first sentence thereof; and referring to the second sentence of Paragraph VI of the complaint, Respondent admits that it "refused said demand," but denies all other allegations of said second sentence of Paragraph VI of said complaint, and alleges that in the normal course of collective bargaining leading up to and culminating in the contract entered into July 27, 1953, that the issues of bonus payments and sick leave were discussed, negotiated, and were not agreed to by the parties of the Agreement, and are therefore not included within said contract, it being the intention of the parties that the written contract of July 27, 1953, was to be the only contract between the parties thereto, and was not to be changed, altered, supplemented or terminated by any oral agreement or other form of agreement not meeting the same requisites and form of the written agreement itself.

VII.

Answering Paragraph VII of the complaint, Respondent denies each and every allegation thereof, and alleges, without admitting that an oral agreement was ever entered into, that the parties to the agreement of July 27, 1953, having through the normal process of collective bargaining reduced their respective proposals and counter-proposals to writing and having entered into a written contract which sets out all points agreed to, neither party can now be heard to offer oral evidence which

changes, modifies or supplements the written contract.

VIII.

Answering Paragraph VIII of the complaint, Respondent denies each and every allegation thereof because it has no specific knowledge of the same.

IX.

Answering Paragraph IX of the complaint, Respondent admits that on or about December 25, 1953, it paid bonuses to some of its employees who were not members of the union nor in the unit as set forth in Paragraph IV of the complaint, but did not pay bonuses to those of its employees who were members of the Union or were in the unit as set forth above and refused to pay these employees in the unit a Christmas bonus, but denies that a Christmas bonus is customary and is paid annually to all employees of Respondent.

X.

Answering Paragraph X of the complaint, Respondent admits that since on or about December 25, 1953, at various times, the Union, through its officers and agents requested Respondent to pay the Christmas bonus to all employees without discrimination but denies that it requested Respondent to pay sick leave to employees within the unit without discrimination.

XI.

Answering Paragraph XI of the complaint, Respondent denies each and every allegation thereof.

XII.

Answering Paragraph XII of the complaint, Respondent denies each and every allegation thereof.

XIII.

Answering Paragraph XIII of the complaint, Respondent denies each and every allegation thereof.

XIV.

Answering Paragraph XIV of the complaint, Respondent denies each and every allegation thereof.

XV.

Answering Paragraph XV of the complaint, Respondent denies each and every allegation thereof.

Wherefore, Respondent prays that the complaint herein be dismissed.

Date: September 15, 1954.

INTERMOUNTAIN EQUIPMENT COMPANY,

By /s/ PHILIP A. DUFFORD,
Vice President.

State of Idaho,
County of Ada—ss.

On this 15th day of September, 1954, before me, a Notary Public in and for the State of Idaho, appeared Philip A. Dufford, known to me to be Vice President of Intermountain Equipment Company, the Respondent to the complaint herein, and

acknowledges to me that he has read Respondent's Answer to Complaint, that he knows the contents thereof, and that he believes the same to be full and true, and has executed the same for and on behalf of the Respondent and by authority of its governing body, this 15th day of September, 1954.

[Seal] /s/ MAXINE D. WRIGHT,
Notary Public.

Received in evidence as General Counsel's Exhibit No. 1-H, September 28, 1954.

[Title of Board and Cause.]

AMENDMENT TO ANSWER

Comes now Respondent in the above-entitled proceeding, and as amendment to its Answer filed therein, and for further and affirmative defense, alleges:

I.

Respondent realleges each and every allegation of its Answer filed herein as fully as if the same were set at length in this Amendment, and its Answer is incorporated herein by reference and made part hereof.

II.

The denials of bonuses and sick leave to Respondent's employees who are members of the Union and were in the unit as set forth in paragraph IV of the Complaint constituted and gave rise to grievances or disputes under the terms and provisions of the

contract of July 27, 1953, between Respondent and the Union; but at no time did any employee or group of employees in the unit present a grievance or dispute under the terms of the contract, nor has the Union pursued the remedy provided thereby on behalf of employees in the unit, and until such remedy has been pursued and all remedial action under the terms of the contract has been exhausted, no complaint should have been issued.

III.

After the filing of the Charge and Amended Charge herein and prior to the issuance of the Complaint, Respondent and Union met and bargained on the issues of bonus and sick leave, and as a result of collective bargaining, sick leave was incorporated in the contract dated July 27, 1954, between Respondent and Union, and bonuses were definitely excluded therefrom by agreement of both parties, and it was the intention of the parties that the exclusion of bonuses is as much a part of the contract as the inclusion of sick leave.

IV.

By meeting and bargaining with the Union on the issues of sick leave and bonuses, Respondent has rectified any violation of the National Labor Relations Act and has voluntarily taken affirmative action which the Board might require under a remedial order, wherefore the issues on which the Com-

plaint is based have become moot and further proceedings herein are unwarranted.

V.

After the filing of the Charge and before issuance of the Complaint herein, Respondent on many occasions requested the Nineteenth Region of the Board, its officers and representatives, to take action on the Charge, and subsequently, the Amended Charge, in order that it would not be compelled to enter into bargaining for the 1954-1955 contract under an atmosphere of restraint and coercion, but at all times the Nineteenth Region of the Board, its officers and representatives, failed and refused to take action by dismissal of the charges or issuance of a complaint and they, on several occasions, threatened the Respondent by stating that the Respondent would be guilty of unfair labor practices by refusal to bargain and that the Respondent had better bargain even though no action had been taken on the Charge and Amended Charge, and by reason of these threats, and under this atmosphere of coercion and restraint, Respondent, against its better judgment and will, entered into negotiations for the 1954-1955 contract in good faith but under duress, with the Union which, in bad faith, has used these charges as a lever in an attempt to obtain advantage over Respondent in negotiations and other dealings.

Wherefore, Respondent alleges that the allegations upon which the Charges are based and the Complaint was issued are without basis in fact,

that they were brought in bad faith and used in bad faith, that the Charging Union brought these charges for the purpose of obtaining undue advantage over the Respondent and for discrediting it in the eyes of its employees and customers, that the Nineteenth Region of the National Labor Relations Board, by and through its officers and representatives, conspired with the Union, and that with the Union and independent of the Union, they have pursued this action in bad faith,

Now Therefore, Respondent prays that the complaint herein be dismissed and that appropriate relief be given Respondent against the acts of the Union and the Nineteenth Region of the Board and that proper action be taken to censure the Union and officials and representatives of the Board who have wrongly used their powers and have breached the public trust.

September 27, 1954.

[Seal] INTERMOUNTAIN EQUIPMENT COMPANY,

By /s/ PHILIP A. DUFFORD,
Vice President.

State of Idaho,
County of Ada—ss.

On this 27th day of September, 1954, before me, a Notary Public, in and for the State of Idaho, appeared Philip A. Dufford, known to me to be Vice President of Intermountain Equipment Company

the Respondent to the Complaint herein, and acknowledged to me that he has read this Amendment to Answer, that he knows the contents thereof, and that he believes the same to be full and true, and has executed the same for and on behalf of the Respondent and by authority of its governing body, this 27th day of September, 1954.

[Seal] /s/ MAXINE D. WRIGHT,
Notary Public,
Residing in Boise, Idaho.

Received in evidence as General Counsel's Exhibit No. 1-I, September 28, 1954.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a charge and amended charge filed on January 11 and March 8, 1954, respectively, the complaint in this case was duly issued on September 7, 1954, alleging that the Intermountain Equipment Company, herein called the Respondent, had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charge, complaint, and notice of hearing were duly

served upon the Respondent and the charging party, General Teamsters, Warehousemen and Helpers, Local Union 483, herein called the Union.

According to the complaint, the same conduct violated the three subsections of Section 8 enumerated above, such conduct taking place when, in the course of collective bargaining with the Union, the Respondent, although refusing to agree to contract provisions calling for a certain amount of sick leave and an annual bonus, allegedly had orally agreed that, if any bonuses were paid to employees, all employees, including those in the bargaining unit, would be paid bonuses without discrimination and that sick leave would be granted to all employees without discrimination, as in the past, but that since July 27, 1953, the employees in the unit had lost wages because of sickness for which sick leave was not granted and that, although the Respondent had on about December 25, 1953, paid bonuses to substantially all its employees who were not members of the Union nor in the bargaining unit, it had failed and refused to pay to the employees in the bargaining unit the customary Christmas bonus paid annually to all its employees. The Respondent's answer, dated September 5, 1954, conceding jurisdiction, admitted the payment of bonuses to some of its employees, excluding those in the unit, and admitted refusal to pay bonuses to employees in the unit, but justified such nonpayment on the ground that bonuses were a subject of negotiation and, after discussion, were excluded from the con-

tract resulting from such negotiations. The answer denied knowledge of loss of wages by employees in the unit as a result of sickness and denied any promise to pay sick leave as in the past. In an amendment to its answer, dated September 27, 1954, the Respondent avers that denials of bonus and sick leave constituted and gave rise to grievances or disputes under the terms of the 1953 contract between the Respondent and the Union but the remedy so provided had not been utilized and that no complaint should have issued until all remedial action under the terms of the contract had been exhausted. The amended answer also asserted that the issue involved had become moot because after the filing of the charge and before issuance of the complaint the Respondent had met with the Union and bargained on the subject of bonus and sick leave and that, as a result, sick leave had been incorporated into the 1954 contract but bonuses were excluded from the contract by agreement of both parties. The amendment to the answer further alleged that the charge was filed in bad faith and without foundation in fact and that the Nineteenth Regional Office of the National Labor Relations Board, herein called the Board, had conspired with the Union in using the charge for the purpose of obtaining undue advantage over the Respondent and for discrediting it in the eyes of its employees and customers.

Pursuant to notice a hearing was held before me, as the duly designated Trial Examiner, in Boise,

Idaho, on September 28, 29, and October 1, 1954. The General Counsel of the Board, the Respondent, and the Union was each represented by counsel. Full opportunity was afforded all parties to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. At the opening of the hearing, counsel for the General Counsel of the Board, hereinafter called General Counsel (including counsel appearing on his behalf), moved to strike certain portions of the amendment to the answer, including the portion alleging a conspiracy on the part of the Regional Office of the Board. The motion was granted as to the latter part and denied as to the balance. At the close of the General Counsel's case-in-chief, the Respondent moved to dismiss the entire complaint. The motion was denied. At the close of the hearing, the parties argued orally and were given time in which to file briefs. The General Counsel's motion to conform the complaint to the proof in formal matters was granted.

On November 9, 1954, following the close of the hearing, the Respondent filed a motion to strike the testimony of two witnesses which was offered in rebuttal, a motion to dismiss the entire complaint, and a brief in support thereof. The first motion is denied. The testimony alluded to is not the basis of an unfair labor practice in itself in view of the fact that it went to an incident occurring more than 6 months before the filing of the charge. However, the testimony went to a state of mind on the Re-

spondent's part, from which a disposition to discriminate might be deduced. As such evidence tended to cast doubt on the Respondent's good faith previously attested by its own witnesses it is within the scope of rebuttal evidence. The Respondent's motion to dismiss the complaint is granted as to the alleged refusal to bargain and denied as to the balance because of the findings and conclusions herein made. A brief was also received from the Union and has been considered.

From my observation of the witnesses and upon the entire record in the case, I make the following:

Findings of Fact

It is conceded and I find that the Respondent is engaged in commerce within the meaning of the Act in amount well in excess of the $50,000 direct out-of-state sales as well as in excess of the amount of interstate purchases necessary to bring it within the Board's present formula for asserting jurisdiction. It is also admitted and I find that the Union is a labor organization within the meaning of the Act.

The Respondent's amendment to its answer raises a question as to whether or not resort to the grievance procedure under the 1953 collective bargaining agreement was a condition precedent to any resort to unfair labor practice proceedings under the Act. Section 10 (a) of the Act provides that the power of the Board to prevent unfair labor practices "shall not be affected by any other means of adjust-

ment or prevention that has been or may be established by agreement, law, or otherwise * * *'' Therefore, the contention of the Respondent that the complaint should not have issued is without merit.[1]

I. The Unfair Labor Practices

A. The Refusal to Bargain

1. History of bonus and sick-leave practices; history of bargaining

The Union was certified by the Board as the collective bargaining representative of a unit[2] of the Respondent's employees, roughly the equivalent of the tool room employees in the Respondent's Boise establishment, on June 26, 1953. On July 3, 1953, Frank Baldwin, secretary-treasurer of the Union, approached Philip Dufford, the Respondent's vice

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[1]N. L. R. B. v. Newark Morning Ledger Co., 120 F. 2d 262, 266 (C.A. 3); N. L. R. B. v. Walt Disney Products, 146 F. 2d 44 (C.A. 9); Dant & Russell, Ltd., 92 NLRB 307.

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[2]The unit, concerning the propriety of which no question is raised, is "All warehouse employees of Intermountain Equipment Company, construction machinery, equipment and parts sales and service plant in Boise, Idaho, including warehousemen, shipping and receiving clerks, price clerks, countermen, order clerks, delivery men, inventory clerks and warehouse filing clerks, excluding all managers, assistant managers, foreman, confidential secretaries, office clerical employees, outside salesmen, professional employees, guards and supervisors as defined in the Act.

president and general manager, relative to a collective bargaining contract. Thereafter, negotiating meetings were held on July 22 and two other days before July 28, 1953, when a collective bargaining agreement, reached on July 27, was signed. Negotiations were conducted by Baldwin, Roy Buntin, and Alvin Stewart (the latter two being employees) for the Union and by Dufford and Ray Fortune for the Respondent. Dufford, being inexperienced in labor relations, had asked Fortune, who was in charge of labor relations for Morrison-Knudson Construction Company, to assist him. Among the topics bargained about, the subjects of wages, union shop, bonuses, and sick leave raised the greatest controversy. At about the third session, the parties discussed the union-shop demand. Dufford at first was opposed to it, but Fortune told him that Baldwin would never sign a contract without it. Discussion then centered on the period of time within which employees would have to join the Union. The Union asked the minimum time permitted by the Act. Dufford sought to extend the compulsory joining date for 6 months after date of hire. Finally the parties compromised on a 60-day period. The subjects of bonus and sick leave were then discussed.

Although, before 1953, bonus payments had been made for a number of years extending to years before 1950, no formalized plan had ever been adopted. The Respondent considered payment of a bonus to individual employees to be a matter of discretion

on the part of management after consideration of a number of variable factors. But there is evidence from which it may be found that, in practice, an employee who had been employed for a minimum of a year might expect to receive a bonus equivalent to about 1 month's wages or salary and it was stipulated that for some years prior to 1953 the Respondent had paid bonuses to substantially all its employees, including those whose job classifications were included in the unit. I infer therefore that in practice the size and payment of bonuses were more routine and in pattern than they were in theory.

Before the certification of the Union, the Respondent had no formalized practice with respect to compensated absences because of sickness or otherwise. That is to say, it had never defined what would constitute a good excuse for absence, and it had set no definite limit on the duration of compensated absence for sickness. Except in unusual situations, the Respondent left the matter of compensation for time not worked to the department heads on an informal basis, and the evidence indicated considerable lenience in such matters, not only in cases of sickness but also time off granted for errands and even a day or so off in the hunting season.

In negotiations, the Union was asking a contract provision for the payment of a bonus equivalent to 1 month's salary and it was asking for 6 days' paid sick leave during the year's period. Dufford opposed a contract provision covering either one. He said that if a definite period of sick leave were

given, the employees would take it as of right whether or not they were sick. Stewart was inclined to agree with Dufford that there was a danger of abuse. Baldwin said that such was not always the case, mentioning one company (with whom the Union had a contract) of whose employees 35 per cent did not use the full period of sick leave allowed. Dufford asked why the Union wanted sick leave in the contract and asked if they were not satisfied with the way the Respondent had handled sick leave in the past. Stewart answered that he had never taken sick leave but understood from the other employees that it had been satisfactory. Dufford said that he was proud of the Respondent's sick-leave record, that one employee had been out for quite some time with polio and was never docked. Baldwin asked if he would change the policy, and Dufford replied that he saw nothing in the near future that would justify changing the policy.

The discussion then shifted to the bonus clause. Dufford opposed this on the ground, as he put it, that the Respondent had no set policy regarding bonus payments and that it was strictly the prerogative of management, that the Respondent had no written bonus arrangement with any employee and had never had any, that if he agreed to put a bonus provision in the contract he would be committing the Respondent to paying a bonus whether or not the Respondent showed a profit, and that the Respondent would then have to pay the employees in

the unit a bonus whether or not it paid one to the other employees. The testimony is understandably at variance as to other statements made at this meeting by Dufford and Baldwin, which in retrospect assume some degree of importance. Baldwin quoted Dufford as saying that in past history the Respondent had paid bonuses to all employees and that he did not intend to change, that if anybody was paid a bonus they would all be paid a bonus. Dufford denied having said that if anyone was paid a bonus all would be paid a bonus, but he testified that, on several occasions during negotiations, he was asked questions concerning discrimination and had replied that none was intended. Since the Respondent undoubtedly reserved the right to exclude from the bonus payment any employees who had worked too short a time or who, by virtue of serious fault, merited no bonus, I conclude that Dufford did not make a statement quite so broad as that quoted by Baldwin. At one point, Fortune commented that his company paid bonuses to monthly-paid employees but not to hourly-paid employees. Dufford said that the Respondent had never discriminated between monthly-paid and hourly-paid employees with respect to the bonus. Baldwin expressed some concern that this practice might change and that employees outside the unit would be paid bonuses while those in the unit would not. Dufford said that it was not his intent to discriminate. At about this point, as nearly as I can determine by piecing together the testimony of the several witnesses who testified concerning it,

Fortune interposed by saying to Baldwin, "You heard the man. Now the monkey is on your back." Baldwin told Fortune to be quiet or he would come over to his place and organize his employees. After a few other irrelevant remarks, Fortune, turning to Dufford, commented with respect to Baldwin's statement about organizing the employees of Morrison-Knudson that, whatever Baldwin said he would do, he would do; and then, addressing Baldwin, Fortune said that the same went for Dufford and that whatever Dufford said he would do was exactly what he would do. This was taken by Baldwin to mean that Dufford's assurance about nondiscrimination could be relied on and that the Respondent would continue to handle sick leave and bonus payments without a contract provision in the same manner as in the past. Baldwin called Buntin and Stewart out of the room for a conference, and asked them if they had always received a bonus and if they should take Dufford's word about the policy remaining the same. Buntin, who had been with the Respondent for nearly 5 years, said that he had always received a bonus and that as far as he knew, Dufford's word was good. Stewart concurred. Expecting a continuance of past practices with respect to bonuses and sick leave, the union negotiators returned to the meeting room, and, without again mentioning the subject of bonuses and sick leave, began negotiating on wages.

After the parties had reached agreement on the terms of the contract on July 27, the union com-

mittee tendered the agreement to the employees in the unit with an explanation of what had been said about bonuses and sick leave. The employees approved the contract.

Shortly after the Union's certification by the Board, the Respondent had installed a time clock in the parts department for the employees in the unit.[3] Following the execution of the collective bargaining agreement in July, 1953, the Respondent instructed the supervisors in the parts department that they should adhere strictly to the contract and not do anything or give anything except what was in the contract. As a result, only time shown as worked by the clock was paid for and absences because of sickness were no longer approved for compensation. No instructions regarding sick leave were given to supervisors of other departments. I infer, therefore, that the practice of giving sick leave continued except in the department covered by the union contract.

About Christmas time, 1953, the Respondent paid a bonus to substantially all its employees other than those in the unit. The latter were paid no bonus. The decision to pay no bonus to those in the unit was reached in December by Dufford in consultation with Respondent's President Swenson. The

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[3]This was not alleged or proved as an unfair labor practice, whether because the General Counsel believed no discrimination was committed thereby or because the event may have taken place more than 6 months before the date of the filing of the charge is not certain.

reason for such decision, Dufford testified, was "because we had a contract of employment with those people by which we guaranteed and had to live by the contract, which bound us to certain terms with these people, such specific binding agreement not existing with the other people, and by the terms of which contract, we could incur considerable expense. Also due to the fact that there was a possibility that payment of a bonus could, under certain sets of circumstances become a violation of our contract or * * * that unfair labor charges could be filed against us for, conceivably could be filed for payment of a bonus."

After the bonus was paid to employees outside the unit, the Union had two meetings with the Respondent in which that subject, along with a matter of hours of work, was discussed, and on January 4, 1954, Baldwin telephoned Dufford to say that he understood "some of the boys * * * had been docked for the sick leave," and he asked Dufford if the Respondent was going to pay it. According to Baldwin, Dufford "still took the position that was the Company's prerogative and that ended the conversation." The 1953 bonus was never paid to employees in the bargaining unit. When the parties negotiated a new contract in 1954, a provision for sick leave, but not for bonus, was agreed to.

2. Arguments and conclusions

The General Counsel contends that, during negotiations for the 1953 contract, the parties made a

collateral oral contract which was not inconsistent with the terms of the written contract and that the alleged refusal to bargain was the Respondent's repudiation of the collateral agreement and the alleged discrimination was the disparate treatment of employees in the unit and outside the unit with respect to bonus and sick leave. The General Counsel does not specifically argue that the refusal to bargain consisted of a unilateral change in working conditions without prior notice to the Union and opportunity to bargain thereon, but the conclusionary allegations of the complaint classify the Respondent's withholding of the bonus to those in the unit, while granting it to those outside the unit, as violations of Section 8 (a) (1), (3), and (5). Presumably, therefore, the General Counsel is relying on two theories of refusal to bargain as well as on the theory of discrimination and interference.

The Respondent denies the existence of a collateral agreement, and in its answer alleges that the issue of bonus and sick leave has become moot because, since the filing of the charge (January 11, 1954) and amended charge (March 8, 1954) and before the issuance of the complaint (September 7, 1954), the Respondent and the Union met and bargained on the said issues and as a result incorporated sick leave in the contract dated July 27, 1954, and excluded bonuses therefrom. By such bargaining, the Respondent alleges that it has rectified any violation of the Act to the equivalence of any affirmative action the Board might require under a

remedial order in this case. It is not clear whether the bargaining which took place between the parties in the period following the filing of the charge and amended charge and before the issuance of the complaint was limited to negotiating for the 1954 contract or whether it also involved negotiations respecting the payment of a 1953 bonus and of sick leave during the terms of the 1953 contract. If it was limited to the 1954 contract, the issue obviously is not moot. From other statements made in the Respondent's answer, as well as from evidence offered, I infer that the bargaining that took place between the date of the filing of the charge and the execution of the 1954 contract was confined to that contract. That bargaining looked only to the future, therefore, and not to rectifying any possible past unfair labor practices. The subject of bonuses was mentioned in two meetings toward the end of the year 1953, but evidence is lacking as to what was said there about the 1953 bonus. It is not clear whether what was said in those two meetings was just a protest by the Union with a rejection thereof by the Respondent or whether the parties explored the subject fully from a standpoint of bargaining. In any event, if any unfair labor practices were committed by the Respondent, I conclude and find that they are not moot.

The first issue to be disposed of is that of a refusal to bargain, whether on the theory of a repudiated collateral oral agreement or on the theory of making unilateral changes in existing conditions

without consulting about them with the Union. The Respondent not only denies the existence of a collateral oral agreement but takes the position that legally there could not be one made in the negotiation for a written contract because the understandings reached by the parties orally merge in the writing as the consummation thereof. It is often stated as a rule of law that in the absence of mistake or fraud a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and the whole engagement of the parties and the extent and manner of their undertaking are embraced in the writing.[4] But rules invariably have their exceptions. And an exception to this rule is that the parol evidence rule does not apply to a purely collateral contract distinct from and independent of the written agreement although it may relate to the same general subject matter and grows out of the same transaction, if it is not inconsistent with the writing.[5] In the case at hand the writing did not provide that there should be no sick leave or bonus so there would be no inconsistency between the writing and a collateral oral agree-

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[4]Van Ness v. Washington, 4 Pet. (U.S.) 232; Brawley v. United States, 96 U. S. 168; Hawkins v. United States, 96 U. S. 689, Trego v. Arave, 20 Idaho 38, 116 P. 119; Rosen v. Tackett, 222 Mich. 673, 193 N. W. 192.

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[5]Booth v. Booth & B. Commercial School, 120 Conn. 221, 180 A. 278; Mitchell v. Lath, 247 N.Y. 377, 248 N.Y. 526, 160 N.E. 646, 162 N.E. 511; Roof v. Jerd, 102 Vt. 129, 146 A. 250. See A.L.I. Restatement, Contracts, Vol. I, Sec. 229.

ment. But the formation of such a collateral oral agreement would be subject to the law of formation of contracts generally. A clear meeting of the minds would be necessary, and the undertaking would have to be of the kind that the law recognizes as obligatory. I am not satisfied that such was the case here. From something that Dufford said, Baldwin got the impression that, although the Respondent would not commit itself to the definite payment of a bonus, it would not discriminate against employees in the unit if a bonus should be paid to employees at all. If the Respondent had been willing to commit itself to such an undertaking, that undertaking could, of course, have been given expression in the written contract. The failure of the union negotiators to suggest such a clause in the contract is a factor that must be considered in determining the probabilities of the existence of a collateral agreement. The parties may, of course, have been weighing the matter not so much of including such a provision in the contract as of leaving the subjects of bonus and sick leave under the Respondent's informal discretionary handling as in the past, with the understanding that there would be no discrimination in the exercise of the Respondent's discretion. But if the parties intended a collateral contractual commitment of this sort, it would be expected that the parties would attempt to nail the matter down. In order to do so, the Union would, in all probability, upon returning from the private conference across the hall between Baldwin, Buntin, and Stewart, have announced to Dufford: "All

right. We agree not to require a provision on bonuses or sick leave in the contract in consideration of your promise that you will hereafter treat the employees in the unit in all respects as you treat those outside the unit in regard to these matters." This would have been specific notice to Dufford that the Union intended a collateral agreement and it would have required Dufford squarely to agree or disagree. The failure of the union representatives to mention the subject again after returning to the conference room is an element that derogates from the force of the General Counsel's contention that a collateral agreement existed. I am inclined to the opinion that the Union's attitude was one of reliance on a gentlemen's agreement, that is, on the good faith of the Respondent rather than on a contractual commitment. I find, therefore, that no collateral oral agreement, in the legally enforceable sense, was in fact intended or made.

The General Counsel's first contention in support of his allegation of a refusal to bargain in violation of Section 8 (a) (5) of the Act—that a repudiation of a previously made collective bargaining agreement, in itself, is a refusal to bargain in violation of the Act—will not need to be passed on here, as I have found that no collateral oral contract was in fact made.[6] But his second apparent contention,

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[6]Although the Board has not, so far as I am aware, passed on such a contention on facts such as those involved here, it has frequently stated that it will not police the terms of collective bargaining agreements.

that the unilateral termination of the practice of giving sick leave and bonuses constituted a violation of that section of the Act, requires examination. If the discriminatory aspect of the change is, for the moment, removed from consideration, I see no basis for a contention that the unilateral change was a refusal to bargain. Suppose, for the sake of argument, that the Respondent had discontinued its sick leave and bonus practices as to all employees. This would eliminate the appearance of discrimination. Under the remaining facts of this case would such a change have constituted a refusal to bargain? I think not, because after negotiations on the subject, in which the Respondent had taken the position that bonuses were a matter of management prerogative and that the Respondent did not wish to be bound to pay bonuses whether or not profits warranted it, the Union appeared content to leave those matters under the unilateral administration of the Respondent.[7] It was contemplated, therefore, that the Respondent would not need to propose changes in bonuses or sick leave for bargaining before acting unilaterally.[8] Furthermore, such evidence as there is indicates that the Union was given an opportunity to negotiate on the matter after the bonus was given. Hence, I find that the Respondent did not

[7]See The Borden Company, 110 NLRB No. 127.

[8]In this respect, the case differs from Armstrong Cork Co. v. N.L.R.B., 211 F. 2d 843, and other cases where unilateral action was held to constitute a refusal to bargain.

refuse to bargain with the Union within the meaning of Section 8 (a) (5) of the Act.

There remains the question of whether or not the act of the Respondent in excluding the employees in the bargaining unit from participation in the bonus payments and sick-leave benefits, although affording them to substantially all other employees, constituted a discrimination within the meaning of Section 8 (a) (3) of the Act. In the cases where unilateral changes have been dealt with under charges of violation of Sections 8 (a) (1), (3), and (5), the discussion has sometimes centered on the question of refusal to bargain, and the decision on the matter of discrimination seems to have ridden in on the 8 (a) (5) disposition, whichever way that went. For example, in the case of Armstrong Cork Co. v. N.L.R.B., 211 F. 2d 843 (C.A. 5), the court enforced the Board's order based on findings of 8 (a) (1), (3), and (5) violations in the withholding of a general wage increase from union-represented employees while granting it to other employees (103 NLRB 133), while in the case of N. L. R. B. v. Nash-Finch Company, 211 F. 2d 622 (C.A. 8), the court denied enforcement of the Board's order based on findings of like violations for the discontinuance of life insurance, hospitalizations, and Christmas bonus (103 NLRB 1695). In neither of the foregoing cases did the court attempt to separate the discrimination aspect of the case from the refusal-to-bargain aspect. In fact, neither court appears to have given the question of discrimina-

tion any separate consideration at all. Yet, it appears to me that a separation of the two aspects of such cases is especially essential, both in respect to the existence of an unfair labor practice and in respect to the appropriateness of a remedy. For a refusal to bargain, the appropriate remedy is not that a respondent shall rectify a discrimination by giving benefits withheld. The injunctive and affirmative orders in a case of refusal to bargain are designed only to require the performance of the statutory duty to bargain. Where the Board's order is designed to equalize disparate treatment of employees, such remedy is appropriate to the cases in which a violation of Section 8 (a) (3) rather than 8 (a) (5) is found. In fact, in the absence of a finding of discrimination, I can think of no case where a refusal to bargain could appropriately be remedied by an order to give monetary benefits to one group of employees from which group alone they had been withheld. Where the Board gives such remedy, it is because it finds an unlawful discrimination without regard to whether or not a refusal to bargain is involved in the case.[9] The failure of the court in the Nash-Finch case to discuss the matter of discrimination at all detracts from its force as a precedent in this case, because the

[9]Jersey Coast News Co., 105 NLRB 430; Newark News Dealers Supply, 94 NLRB No. 239; Gaynor News Co., 93 NLRB 299; Rockaway News Supply Co., 94 NLRB 1056; Winona Textile Mills, Inc., 68 NLRB 702; Sullivan Dry Dock and Repair Corp., 67 NLRB 627; Chicago Steel Foundry Company, 49 NLRB 100.

absence of discussion of discrimination suggests an oversight. Perhaps the court would have reached the same conclusion on the facts of that case even if it fully considered the question of discrimination, because it was of the opinion that a change in the language of the proposed maintenance-of-standards clause was made with a design to eliminate the fringe benefits previously enjoyed.[10] On such an interpretation of the negotiations, a claim to discriminatory treatment might be ungrounded. If a bargaining representative, seeking a contract provision for the payment of a bonus or other benefit, is told by the employer with whom it is bargaining, "No, we will not give it to you—what we have otherwise said we would give the employees represented by you is the sum total of what we will give them, even though we reserve the right to give additional benefits to employees outside the collective bargaining unit," and if the bargaining representative settles on that basis, it is charged with notice

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[10]The Union at an early stage of the negotiations in the instant case proposed a clause that employees would retain the special privileges previously enjoyed. This was apparently rejected and eliminated. The Respondent suggests that "special privileges" included sick leave and bonus, and thus apparently seeks to make the facts here more analogous to those in the Nash-Finch case. But the bonus and sick-leave clauses were separately proposed in the negotiations in addition to the special-privileges clause. Stewart testified that the special-privileges clause was intended to cover such subjects as coffee breaks. I conclude that the parties understood that sick leave and bonuses were not intended to be covered by the special-privileges clause.

of the possibility of disparate treatment—notice that the employees whom it represents may not be given such additional benefits as may be given to unrepresented employees. Any discrimination that follows would not, in my opinion, be unlawful discrimination because the right to complain of discrimination was consciously bargained away. Although the parties in the Nash-Finch case did not put their intentions into such express language, the court apparently concluded that the effect was the same as if they had. The difference of opinion between the Board and the court in that case is not as to what result would follow in a case where the intent of the parties is expressed as I have put it above in the hypothetical case but apparently stems from the interpretation of the words and acts of the parties. The Board interpreted them as showing no intent to bargain away existing conditions, while the court apparently interpreted them as showing such intent. Indeed, from the language used by the court, one receives the impression that the court considered intent to be of no consequence at all, for it recites, "Where parties to a contract have deliberately and voluntarily put their engagement in writing in such terms as import a legal obligation without uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing. Ford v. Luria Steel & Trading Corp., 8 Cir., 192 F. 2d 880, 884 and cases cited." By this

language, actual intent is rendered nugatory in the face of a conclusive presumption. The legal generality quoted is not precisely apposite, however. It would be, undoubtedly, if one of the parties were contending that the contract embraced an undertaking not expressed in the final writing. But that was not the case. The union in the Nash-Finch case was not suing for breach of contract, contending that additional benefits beyond those shown in the writing were contracted for. The contention there advanced by the General Counsel and accepted by the Board was that the several fringe benefits were not contracted for. So the question was not whether or not the writing expressed the full contract. It was whether the parties intended to leave the subject of fringe benefits open for future negotiations, or intended that further consideration of them should be foreclosed. The court may have been justified in attributing the latter intent to the parties on the facts of the case; an inference of such intent was not unreasonable. But resort to a conclusive presumption in the Nash-Finch case was not needed and I do not read the decision there as a complete disregard of intention. Certainly, if the parties after negotiating on a fringe benefit, decide that further study is needed before any agreement can be reached thereon and thus decide to postpone further negotiation on that subject for 60 days to permit such study, meanwhile executing a collective bargaining agreement covering everything agreed to up to that point, the execution of the contract should not foreclose further negotiations. This is

because the intent of the parties discloses otherwise, and no conclusive presumption should be drawn, contrary to the intentions of the parties, that the execution of the written contract sealed off negotiations on the deferred subject.

The Board, of necessity, recognizes the importance of the apparent intent of the parties when it distinguishes between those cases where a subject of bargaining is omitted from a written agreement on the one hand after it has been a topic of negotiation and on the other where it has not even been considered for bargaining.[11] In the first, the failure to press for the omitted subject in my opinion justifies an inference that the party making the demand originally is content to dispense with any contractual obligation in view of the other concessions made (the problem of interpreting Section 8 (d) of the Act wholly aside). In the second, no inference of such an intent can be drawn. The natural inference there would be that neither party even thought of the matter.

Whether or not the court in the Nash-Finch case reached a correct conclusion, I am of the opinion that the court did not distinguish between a con-

[11]The Jacobs Manufacturing Company, 94 NLRB 1214, where the Board indicates that the parties by expressed intent may foreclose bargaining during the terms of the contract by stating therein that they intend the contract to be complete and to foreclose further bargaining whether or not subjects of bargaining were raised in negotiations. See Phelps Dodge Copper Products Corporation, 96 NLRB 982.

tractual obligation to furnish something and a statutory obligation to bargain about that subject. Also in the court's opinion is an apparent intimation that collective bargaining agreements are to be tested by the rules governing contracts generally so that if the parties fail to negotiate and contract concerning a negotiable subject that subject is excluded as a negotiable subject for the term of the contract. That result might follow where strangers or parties having no existing relationship enter into a contract. Neither may compel the other to consider additional subjects for contracting. But a collective bargaining agreement is one reached by parties between whom there is an existing and continuing relationship which constantly gives rise to bargainable matters. In the interest of industrial peace, Congress has, by the Act, imposed a duty to bargain where it would not otherwise exist. It has also proscribed discrimination to encourage or discourage labor organizations. Contracting strangers are unfettered in either way. The same legal principles cannot, therefore, be applied to both types of contracting parties.

Because the Union, during negotiations, acceded to the Respondent's retention of control over the bonus and excused absence for sickness, it presumably waived those subjects as bargainable items for the duration of the 1953 contract. Does it follow, then, that the Respondent's withholding of the bonus and sick leave from employees in the bargaining unit is not only no refusal to bargain but

also no discrimination? If the parties had expressly agreed that bonus and sick leave were to be no longer given, any suggestion of unlawful discrimination thereafter arising from disparate treatment of employees in the unit from those outside in respect to those matters would be successfully dispelled. It is the Respondent's position that the same result should follow on the facts of this case. Dufford gave as reasons for withholding the bonus from the employees in the bargaining unit, first, that by the collective bargaining contract the Respondent "could incur considerable expense" and, second, that if a bonus were paid unilaterally an unfair labor practice charge "conceivably could be filed."

The first ground was apparently intended by Dufford to carry with it the idea that employees in the unit were given unequal advantage by the contract and that this was equalized by giving bonuses to employees outside the unit. In any event, the Respondent had Dufford testify to the wage rate increase resulting from the contract which, it is argued, was something the employees outside the unit did not get. If no more had been said in the bargaining conferences about bonus and sick leave than was said about fringe benefits in the Nash-Finch case, the Respondent's argument would have some force, because in the absence of expressed understandings, an understanding that the bonus might be distributed unequally in order to balance any unequal advantages acquired under the contract

might be presumed. For two reasons, however, I am not moved by the argument. In the first place, it assumes that the contract advantages were not otherwise balanced—a fact not well established. In fact, the evidence leads me to deduce that other compensating factors were present. Although the employees in the unit got an increase in their hourly rate, the Respondent terminated the 7 hours a week over 40 for which overtime pay at the rate of time and a half had been paid in the past. The result was that the take-home pay of employees in the unit, with the hourly-rate increase, was no greater than before and in some instances, at least, was slightly less. As employees not in the unit were mostly on a salary basis, I cannot assume that they suffered any comparable loss as a result of going on a 40-hour week. Rather, it would be natural to assume that their weekly rate remained the same, and, with shorter hours for the same pay, their compensation in effect would have been increased. Also, although no blanket raise in weekly pay was given to employees outside the unit at the time the 1953 collective bargaining agreement went into effect, employees outside the unit did receive merit increases in the period in which that contract was in effect. Except for the hourly rate increase, the contract does not appear to have provided benefits not previously enjoyed.

In the second place, the Respondent did not, at the bargaining conferences, evidence any intent to terminate the bonus and sick-leave practices. On the

contrary, it gave the Union reason to believe that such practices would continue. The Respondent's objection to the sick-leave clause proposed by the Union was only as to the fixed time—not to the allowance of a discretionary amount of time. Dufford's question as to whether the Union was not satisfied with the way sick leave had been handled in the past, his eulogy of the Respondent's handling of sick leave, and his answer, in response to the question as to whether the Respondent would be likely to change its practice, that he foresaw nothing in the near future that would justify changing the Respondent's policy, all were designed to create an expectation that the Respondent's practice respecting sick leave would continue, as in the past, on an informal basis. From such expressions there is no basis to infer that the parties understood sick leave was to be terminated or bargained away in exchange for other benefits. If anything, the Union was induced to give up its sick-leave demand by the Respondent's expressed intent not to change the past practice. Although such expression was not a contractual undertaking, the Union would have been justified in assuming that, if the Respondent made any change in its past practice, it would do so on some basis other than that of failure to include a provision on sick leave in the contract. This is especially true in view of the assurances which Dufford testified he gave several times in the negotiations that no discrimination was intended. The Respondent's present position, that it had a right to withhold sick leave because it was not included in

the contract after the subject was discussed, appears to be ill taken, for it amounts to an assertion that the Union should not have believed that Dufford was making his statements in good faith and so should not have relied on them in foregoing its request for a specific period of sick leave.

The Respondent's objections to the Union's contract proposal of a bonus equal to 1 month's pay was not merely to the definiteness of amount. It also objected to being under a contractual obligation to pay a bonus regardless of whether the Respondent's profits justified it. But here again, the tussle was not for a choice between bonus and no bonus. At the time the Union dropped the discussion about bonuses, no other contract provision was being considered and there was no suggestion that the Union was confronted by the Respondent with a choice between its several demands. Rather, the alternatives were contractual commitment or discretionary handling of bonuses. The Union acceded to the latter. Everything that was said, even if not put in the express words in which Baldwin quoted Dufford (that if any were paid bonuses they all would be paid bonuses), indicated that the Respondent's discretion would be based on its ability to pay and on its evaluation of individuals for determination of merit rather than on union representation or nonrepresentation. If the Respondent actually believed that the bonus was bargained away by the Union and that the execution of the contract relieved the Respondent from even considering in-

dividuals in the bargaining unit for bonus purposes, it would have had such an understanding as soon as the contract was executed. But asked when the decision was made to exclude employees in the bargaining unit from participation in the 1953 bonus, Dufford answered that it was made in December at the time when bonus payments were under consideration. He talked the matter over with President Swenson and at that time decided not to give bonuses to employees in the bargaining unit. Although at the bargaining conferences the Respondent disclaimed any intent to discriminate and excluded such intent as a reason for refusing to include a bonus provision in the contract, in December the Respondent rationalized its discrimination between employees in the bargaining unit and the other employees by the fact that employees in the unit were covered by a contract which did not include a bonus. If an employer were free to discriminate between employees on that ground, he could with impunity deprive employees represented by a union of everything provided before the union became the chosen representative which improved working conditions while at the same time continuing to provide such things for employees not so represented so long as nothing in the union contract provided therefor. So he might remove drinking fountains, washing facilities, work stools, adequate lighting, and many other improvements or conveniences from departments of employees represented by a union while continuing to provide the same thing for other employees. If those things

were not covered by the union contract, the employer would be under no obligation to continue them, but if he is going to discontinue them, he should do so on a nondiscriminatory basis to avoid the type of discrimination proscribed by the Act. So in this case, sick leave and bonuses did not have to be continued, but when the contract was negotiated the parties evidenced a willingness to let such practices continue as before under the unilateral administration of the Respondent without contractual obligation; so if they were to be eliminated, they should have been eliminated on a nondiscriminatory basis.

I find no merit in the Respondent's suggestion that it might have been subject to an unfair labor practice charge if it had given the employees represented by the Union a bonus in 1953. The whole attitude of the Union was that it wanted the employees to have the bonus and was willing that the Respondent continue its past practice. On such facts no unfair labor practice could possibly result from a continuation of past practices.[12]

The Respondent argues that "neither the individual employees nor the Union on their behalf ever made a claim to respondent for sick leave not paid or bonuses not paid under Article VI of the 1953 contract nor were those subjects taken up through grievance procedure of Article XII of

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[12]Texas Foundries, Inc., 101 NLRB 1642; Bishop, McCormick & Bishop, 102 NLRB 1101.

that contract." Article VI of the contract reads: "Any claim for wages must be presented to the Employer in writing within thirty (30) days of the day employee is paid for the period in which wages are claimed." Pay for time absent on account of sickness can be called wages; so a deduction from pay for time lost on account of sickness could give rise to a claim for wages for which notice of claim should have been given under Article VI. But although the bonus had been considered a form of compensation for services rendered, Section VI, of the contract seems inapplicable to any claim for bonus because the language of that section apparently contemplates a claim of short payment of periodic wages rather than of nonpayment of an annual bonus. However, even if the clause in question were applicable, it would apply to a contractual claim; it would not provide a defense to an unfair labor practice charge. If it is to be considered at all in this case, it would be in connection with the remedy. And if considered in connection with the remedy, the limitation agreed to by Article VI would apply only until such time as the Respondent rejected the Union's oral request for payment, because it is a rule of law too well established to require citation of authority that the law will not require the performance of a useless act as a condition precedent. When the Respondent told the Union that it would not pay sick leave or bonus, the Union was not obligated to disbelieve such statement and to file a written claim anyway. I have already stated that when a grievance stems from an

unfair labor practice, resort to the processes of the Board is not foreclosed by the fact that the grievance procedure was also available. Not only does failure to resort to the grievance procedure of the contract not deprive the Board of jurisdiction, but it does not constitute a defense to the merits of the unfair labor practice charge. Also, in view of the Respondent's position that it was not required to and would not pay the bonus or sick leave, the argument that the employees or the Union should nevertheless have followed a useless course through the grievance procedure is unimpressive.

The Respondent argues that, before a finding of unlawful discrimination can be made, it must be proved that the Respondent had an illegal motive to discourage union membership. And, it argues, the very fact that the Respondent entered into a contract providing for an increase in wage rates and for a union shop negatives any intent to undermine the Union. Where it is not evident that an employer's act was designed to differentiate between employees—that is, where he clearly intends to dis- or sentiments, proof of motive may be a necessary element of an unfair labor practice case. But where it is evident that an employer's conduct is based on a differentiation between union and nonunion employees—that is, where he clearly intends to discriminate—it is not necessary to show that the employer intended such discrimination to have the effect of discouraging union membership so long as that would be the natural tendency of the dis-

crimination.[13] No dispute exists here that the Respondent intended to discriminate between the employees represented by the Union and those not so represented with respect to bonus and sick leave. No unfair labor practice would be found even so if the Respondent proved either a justification or an excuse for the discrimination. Such a defense might be established if the Union had authorized the discrimination expressly or by necessary implication. On the facts of this case, I find neither. All the evidence pointed to an understanding that bonus and sick leave would be omitted from the contract in order to allow them to be handled as they had been in the past on a nondiscriminatory basis. The tendency of the discrimination here to discourage union membership was the same as if the Respondent had expressly said, "You may have union representation if you wish, but to show you that you would be better off without it we will terminate the sick leave and bonus which you formerly received as a favor from us and we will give you nothing that we do not have to give." I conclude and find, therefore, that, although the Respondent has not refused to bargain as alleged in the complaint, it has, by a withholding of the 1953 bonus and sick leave from employees in the collective bargaining unit, while granting both benefits to employees outside the unit, discriminated in regard to terms

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[13]Radio Officers' Union v. N. L. R. B., 347 U. S. 17, 33 LRRM 2417 (under discussion of Gaynor Case, II, B.).

and conditions of employment of its employees in violation of Section 8 (a) (3) of the Act and derivatively of Section 8 (a) (1) of the Act.

II. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent as set forth in Section I above, to the extent that they have been found to constitute unfair labor practices, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

III. The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since I have found that the Respondent discriminated against employees in the bargaining unit in regard to terms and conditions of employment by withholding from them the customary bonus, while paying it to substantially all other employees, I shall recommend that it take action to place the employees in the same situation they would have been in, absent the discrimination. As the bonus is usually granted to employees but with some exercise of discretion not influenced by union mem-

bership or representation, the Respondent should determine the merits of employees in the unit to a bonus for 1953 on the same nondiscriminatory basis that it used in determining whether or not employees outside the unit should receive a bonus for that year and it should pay to employees in the unit the amount of any bonuses so determined.

Since the 1953 contract has expired and as the 1954 contract provides for a definite number of days of sick leave, no purpose would be served by an order to grant sick leave in the future. But to the extent that the employees in the bargaining unit suffered loss of pay on account of sickness as a result of the Respondent's discrimination, I shall recommend that the Respondent make them whole. As previously stated, however, the failure of the employees to make claims for wages for such periods of absence within the 30-day period agreed to in the contract would have limited their contractual right to reimbursement. I believe it would effectuate the purposes of the Act to follow the limitation agreed to in the contract with respect to deductions for sick leave for the period during which the employees failed to assert their claims. The first notice to the Respondent of any claim to compensation for sick leave was made in Baldwin's telephone conversation on January 4, 1954. For the period from January 4, 1954, to the end of the 1953 contract, then, the Respondent should make whole the employees in the bargaining unit for any loss of pay suffered by them as a result of the discrim-

inatory refusal to compensate them for time not worked on account of sickness by paying them for such time at their regular rate of pay on the same nondiscriminatory basis that it used in paying sick-leave compensation to employees outside the bargaining unit. By "paying them on the same nondiscriminatory basis" as employees outside the unit is meant with the same discretionary limitations as to maximum duration of absent time for which payment was allowed and the like.

Upon the foregoing findings of fact and the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. On June 26, 1954, and at all times material thereafter, the Union has been the statutory bargaining representative of all employees in the appropriate unit within the meaning of Section 9 (a) of the Act.

4. All warehouse employees of the Respondent, construction machinery, equipment and parts sales and service plant in Boise, Idaho, including warehousemen, shipping and receiving clerks, price clerks, countermen, order clerks, delivery men, inventory clerks and warehouse filing clerks, exclud-

ing all managers, assistant managers, foreman, confidential secretaries, office clerical employees, outside salesmen, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

5. By discriminating in regard to terms and conditions of employment of its employees in the bargaining unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

6. By the conduct in paragraph 5, above, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

7. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

8. The Respondent has not refused to bargain with the Union within the meaning of Section 8 (a) (5) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, I recommend that:

The Respondent, Intermountain Equipment Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in General Teamsters, Warehousemen and Helpers, Local Union 483 or any other labor organization of its employees by discriminating in regard to the terms or conditions of their employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist General Teamsters, Warehousemen and Helpers, Local Union 483 or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Make whole those employees in the collective bargaining unit, above described, who, during the term of the 1953 contract, suffered a loss as a result of the Respondent's discrimination in withholding bonus and sick leave by paying each of them a sum of money equivalent to that which he would have been paid, absent the discrimination against them in the manner described in the section above-entitled "The remedy."

(b) Post at its place of business in Boise, Idaho, copies of the notice attached hereto and marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Nineteenth Region in writing within twenty (20) days from the date of service of this Intermediate Report of what steps the Respondent has taken to comply herewith.

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent refused to bargain with the Union.

It is also recommended that, unless Respondent within twenty (20) days from the date of receipt of this Intermediate Report, notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the Board issue an order requiring Respondent to do so.

Dated this 8th day of December, 1954.

/s/ JAMES R. HEMINGWAY,
Trial Examiner.

Appendix

Notice to All Employees
Pursuant to

the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in General Teamsters, Warehousemen and Helpers, Local Union 483, or in any other labor organization of our employees, by discriminating among our employees in regard to terms or conditions of employment.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist General Teamsters, Warehousemen and Helpers, Local Union 483, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We Will make whole the employees in the bargaining unit covered by the 1953 contract with the above-named union for any loss suffered by them as a result of the discrimination against them.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate against any employee because of membership in or activity on behalf of any such labor organization.

Dated .....

INTERMOUNTAIN EQUIPMENT COMPANY,
(Employer.)

By .....,
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT AND RECOMMENDED ORDER, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS OF THE TRIAL EXAMINER

Comes now the Intermountain Equipment Company, Respondent in the above-entitled matter, and excepts to the Intermediate Report and Recom-

mended Order of the Trial Examiner dated December 8, 1954, and transferred and filed before this Honorable Board on the same date, in the following particulars:

Exceptions to Rulings on Motions

1. Excepts to the denial of Respondent's motion (IR 2:43*) to strike the testimony of Alvin M. Stewart (Tr. 290-293) and the testimony of Roy F. Buntin (Tr. 293-297), which testimony was offered in rebuttal by the charging Union. Further excepts to the statement of the Trial Examiner (IR 2:47-49) to the effect that such testimony tended to cast doubt on Respondent's good faith previously attested by its own witnesses. The record clearly shows (Tr. 177-179, 237-238) that Respondent's good faith and cooperative attitude toward the Union in collective bargaining was attested to by General Counsel's own witnesses. Consequently, such rebuttal testimony, if allowed and given the inference suggested by the Trial Examiner, impeaches previous testimony of General Counsel's own witnesses. The rebuttal testimony referred to is also subject to the objection that it is so uncertain and vague as to have no probative value; that the questions eliciting said testimony were grossly leading; and that said testimony is otherwise incompetent, irrelevant, and immaterial. Re-

*IR 2:43 refers to Intermediate Report, page 2, line 43; TR. 290-293 refers to Transcript of record, pages 290 through 293.

spondent's motion to strike should have been granted.

2. Excepts to the denial by the Trial Examiner of that portion of Respondent's motion to dismiss the complaint as to the violations of Sections 8(a) (1) and (3) of the Act (IR 2:50). This exception is based upon the same reasons as the exceptions hereinafter made to the Trial Examiner's Findings of Fact and Conclusions of Law relative to the alleged discrimination.

Exceptions to Findings of Fact

1. Excepts to the finding of the Trial Examiner to the effect that Respondent's bonus policy was in practice equivalent to about one month's wages after a minimum of a year's employment (IR 4:2-5). The testimony of Mr. Dufford is undisputed (Tr. 102-106) to the effect that payment of bonuses to Respondent's employees was completely discretionary with management both as to payment of the bonus and the amount of bonus to the individual employees if paid; that many factors were considered by management in determining whether or not a bonus would be paid to a particular employee, and if so, how much. There is no evidence to the contrary. The Trial Examiner's inference (IR 4:8-9) that bonus payments in size and regularity were in fact routine is unsupported by substantial evidence in the record considered as a whole.

2. Excepts to the finding of the Trial Examiner (IR 4:30-38) inferring that Respondent had a sick leave policy; that the Company was proud of its policy, and that nothing in the near future would justify changing the policy. The basis for this finding appears to be the testimony of Stewart (Tr. 200). Mr. Dufford testified that the Company had no policy with regard to sick leave and that if the employees were paid when actually off work sick, it was the result of the discretion of individual supervisors rather than Company policy with regard to the same (Tr. 113-118). Stewart's testimony is unsupported by the testimony of Baldwin and Buntin who were present at the meeting at which the statements were allegedly made by Mr. Dufford, and Mr. Dufford has denied the same, affirmatively testifying that the Company had no sick leave policy.

3. Excepts to the finding of the Trial Examiner (IR 5:32) to the effect that employees approved the contract. It is uncontradicted that the employees approved the contract without bonus and sick leave provisions contained therein. The Trial Examiner's omission of the underlined words above distorts the inferences to be drawn from the employees' approval of the contract.

4. Excepts to the finding of the Trial Examiner (IR 5:43-44) wherein he infers that the practice of giving sick leave continued except in the department covered by the Union contract. There is no support for this inference in the record. To the

contrary Mr. Dufford has testified undisputedly that the Company did not have a sick leave policy (Tr. 114), and that employees not in the unit had no assurance of sick leave benefits (Tr. 129).

5. Excepts to the finding of the Trial Examiner (IR 6:14-15) to the effect that the 1954 contract provided for sick leave but not bonus. This finding is incomplete in that it does not state that which the evidence clearly shows, that is, that during the 1954 negotiations the Union again proposed to the Company a sick leave clause and a bonus clause; that both were thoroughly discussed during negotiations and that a sick leave clause was adopted but that a bonus clause was not agreed to and that the Union withdrew its demands for a bonus clause in the 1954 contract (Tr. 236, 237).

6. Excepts to the finding of the Trial Examiner (IR 6:49-54) to the effect that the 1954 negotiations looked only to the future. It is undisputed that prior to the time of the 1954 negotiations the Union had filed the original charge and the amended charge upon which the complaint in this matter was predicated. Although the Employer desired to have the matter of these charges disposed of prior to the 1954 negotiations, this in fact had not been accomplished and both the Company and the Union were aware of the existence and pendency of those charges during negotiations. That the Union voluntarily withdrew its bonus demands during the 1954 negotiations clearly shows that the matter was within the contemplation of the parties and that the Union waived any claim to bonuses.

This, of course, substantially parallels the proceedings during the 1953 negotiations and negatives the alleged discrimination while substantiating Respondent's contention that bonuses were not included in the contract because other substantial benefits were granted in the contract which were not given to the Respondent's other employees.

7. Excepts to the attempt of the Trial Examiner (IR 9:19-22, 9:41 to 10:1) to explain away the opinion of the United States Court of Appeals for the 8th Circuit in the case of NLRB vs. Nash-Finch Company. The Trial Examiner completely misconstrues and distorts the plain wording and meaning of the Circuit Court's opinion in that case.

8. Excepts to the conclusion of the Trial Examiner (IR 9:59-61 footnote) to the effect that the parties understood that sick leave and bonuses were not intended to be covered by the "special privileges clause" proposed by the Union during the 1953 negotiations and rejected by the Company. The record fails to support this conclusion.

9. Excepts to the language of the Trial Examiner (IR 10:1-41) in discussing the Nash-Finch decision for the reason that said language is unintelligible and meaningless.

10. Excepts to the language of the Trial Examiner (IR 11:4-21) in further attempting to distinguish and explain away the Nash-Finch decision. This language is immaterial to the decision of the

issues herein involved, is unintelligible, and is contrary to law.

11. Excepts to the finding of the Trial Examiner (IR 11:34-38) purporting to set forth Mr. Dufford's reasons for withholding bonus payments from the employees in the bargaining unit as being incomplete and misleading. Mr. Dufford testified, and his testimony was undisputed, that the employees in the bargaining unit were not included in the bonus payments made in 1953 because the employees in the unit were covered by a collective bargaining contract which bound the Company irrevocably to certain terms and conditions of employment (Tr. 286), which binding commitments did not exist with the Company's other employees (Tr. 248); that payment of the bonuses could constitute a violation of the contract and could conceivably constitute an unfair labor practice (Tr. 286, 287). Mr. Dufford also testified that as a result of the 1953 negotiations which culminated in a written collective bargaining agreement, the employees received a wage increase of approximately twenty-six cents per hour (Tr. 246), and that the other employees of the Company, those not in the bargaining unit, did not receive comparable wage increases (Tr. 250, 264, 276). Mr. Dufford further testified, and his testimony is undisputed, to the effect that the 1953 contract bound the Company to provide certain fringe benefits such as paid holidays and specified vacations, and that the other employees of the Company, those not in the bargaining unit, did not re-

ceive any guarantee of such fringe benefits (Tr. 248). All of these factors, that is, the wage increases and the guarantee of fringe benefits and other working conditions granted to the employees in the unit but not to the other employees of the Company, as well as those factors mentioned by the Trial Examiner, were the reasons for the Company's decision not to pay bonuses to the employees in the unit. There is no evidence to the contrary.

12. Excepts to the statement of the Trial Examiner (IR 11:52-60) to the effect that the advantages to the employees in the bargaining unit as set forth in the contract were in fact balanced as to the Company's other employees. The Trial Examiner attempts to minimize the twenty-six cents wage increase by emphasizing that there was a reduction in the work week, apparently operating on the theory that an hourly wage increase is not a benefit unless it results in increased weekly take-home pay. Actually and in fact it is a fundamental and elementary principle that a wage increase can consist either of more money for the same work or the same money for less work. And certainly the Company by paying the same weekly take-home pay for fewer hours of work incurs a substantial economic detriment.

13. Excepts to the assumption of the Trial Examiner (IR 12:2-4) to the effect that employees not in the unit enjoyed shorter working hours with no reduction in pay. The evidence is to the contrary (Tr. 266:7-9).

14. Excepts to the finding of the Trial Examiner (IR 12:8-9) to the effect that except for hourly wage increase the 1953 contract did not provide benefits not previously enjoyed. This is directly contrary to the evidence. The 1953 agreement which was introduced into evidence as General Counsel's Exhibit 3 clearly shows that many other benefits such as paid holidays, vacations, seniority provisions, grievance processing procedure, and union shop provisions were provided. None of these had previously been guaranteed to any employees of the Company.

15. Excepts to the statement of the Trial Examiner (IR12:34-39) to the effect that the Company's position is that it had a right to withhold sick leave because it was not included in the contract after negotiations in spite of the alleged statements of Dufford during the negotiations that sick leave would be continued. This statement is contrary to the evidence in that it ignores the facts that the Company did not have an established sick leave policy for any employees prior to the 1954 contract and that Mr. Dufford unconditionally denied making the statements attributed to him by the Union's witnesses (Tr. 280).

16. Excepts to the conclusion of the Trial Examiner (IR 12:53-59) to the effect that Respondent's discretion with regard to bonus would be based on its ability to pay and on its evaluation of individuals rather than on the question of Union representation or nonrepresentation. There is no evidence in

the record to support the suggestion that Respondent's discretion in bonus payments would be based on its ability to pay and there is no evidence in the record to support a finding that Respondent's decision not to pay bonuses to employees in the bargaining unit was based upon the question of Union representation. The record is replete with evidence to the contrary.

17. Excepts to the language of the Trial Examiner (IR 13:8-28) to the effect that Respondent discriminated against employees in the bargaining unit with regard to bonus and then attempted to rationalize its discrimination upon the basis of the contract. There is no evidence in the record to support this inference and Mr. Dufford's testimony is uncontradicted as to the basis for the Company's decision with regard to bonuses and sick leave.

18. Excepts to the Trial Examiner's finding (IR 13:30-36) disregarding Respondent's contention that it might have been subject to an unfair labor practice charge if it had paid a bonus to employees in the bargaining unit in 1953. The language as used by the Trial Examiner shows that his entire thinking in this regard is predicated on the proposition that no one other than the charging Union (Local 483) has the right, power, or privilege to file an unfair labor charge. There is evidence in the record to the effect that some of the other employees of the Company might properly be represented by a labor organization in a unit found to be appropriate by the Board. Consequently, some other Union

seeking to represent such employees conceivably could file charges against the Company on the theory that by granting substantial wage increases and other benefits as well as bonuses, even though not included in the collective bargaining agreement, the Company would thereby interfere with the rights of its employees by encouraging or discouraging membership in one Union as against the other.

19. Excepts to the Trial Examiner's statements (IR 13:38 to 14:16) to the effect that Respondent argues that the wage claim provision and the grievance provision of the 1953 contract constitute a defense to the action. This clearly misstates the Respondent's position. Respondent does not contend that the 1953 contract, and particularly the wage claim and grievance provision thereof, constitute a defense to this action, but rather Respondent argues that the failure to present claims by use of this machinery clearly shows a state of mind on the part of the employees and the Union to the effect that they do not actually consider the 1953 bonus payment and the alleged sick leave payments to constitute money or wages due them. This is perfectly consistent with the Respondent's position that there was no commitment on the part of the Company by written contract or otherwise to make such payments to employees in the unit.

20. Excepts to the statements of the Trial Examiner (IR 14:19-52) to the effect that Respondent clearly intended to discriminate against the Union employees and that there was no dispute as to that

point and that Respondent has failed to prove either a justification or an excuse for the discrimination. This language is contrary to the testimony in the record, there is no evidence of intent or desire to discriminate, counsel for the General Counsel has failed to show any anti-Union feeling or motive, Respondent has established its reasons for the handling of bonuses and sick leave as they were done, and these reasons are without contradiction. Union witnesses testified that the Company never refused to bargain (Tr. 65) and was friendly toward the Union (Tr. 177, 179, 238). Further, the terms of the 1953 and 1954 agreements and the course of negotiations prior to both of those contracts clearly show the good faith of the Company.

21. Excepts to the finding of the Trial Examiner (IR 14:57 to 15:3) to the effect that activities of the Respondent tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. There have been no labor disputes between the charging Union and the Company; the relationship between the Union and the Company has been an outstanding example of peaceful labor management relations since the Union was certified. The history of collective bargaining and the comparative speed in which written agreements have been established, both in 1953 and 1954, together with the substantial concessions given by the company in both contracts, clearly show that no activities of the Company have resulted or tend to result in labor disputes.

Exceptions to the Remedy

1. Excepts to the findings and recommendation of the Trial Examiner (IR 15:7-48) to the effect that Respondent has engaged in unfair labor practices and the remedy therefor should be to pay to the employees in the unit sick leave and bonuses as more particularly set forth in the provisions of the Intermediate Report referred to. Since the findings of the Trial Examiner to the effect that the Respondent has committed unfair labor practices are not supported by substantial evidence in the record considered as a whole as more particularly set forth hereinabove, the entire remedy recommended by the Trial Examiner is improper. It should be to dismiss the complaint in its entirety.

Exceptions to Conclusions of Law

1. Excepts to the conclusion of the Trial Examiner (IR 16:1) to the effect that the Union has been the bargaining representative of the employees in the unit since June 26, 1954. This is contrary to the evidence.

2. Excepts to conclusions 5, 6 and 7 (IR 16:15-26). These conclusions are improper as more particularly set forth hereinabove.

Exceptions to Recommendations

1. Excepts to the recommendations of the Trial Examiner as set forth in the Intermediate Report (IR 16:33 to 17:34). The proper recommendation should be to dismiss the complaint.

Exceptions to Trial Examiner's Failure to Make Certain Findings

1. Excepts to the failure of the Trial Examiner to find that prior to the 1954 contract Respondent had no established sick leave policy with regard to any of its employees (Tr. 114).

2. Excepts to the failure of the Trial Examiner to find that the Respondent at all times acted in good faith in its negotiations with the Union (Tr. 65, 237, 238) and that the Respondent at no time displayed any anti-Union feeling.

3. Excepts to the failure of the Trial Examiner to find that the Union and the Company bargained in good faith during both the 1953 and 1954 negotiations with regard to bonus and sick leave, that prior to the 1954 contract there was no agreement to pay bonus and sick leave, and that during the 1954 negotiations the Union withdrew its demand for bonuses (Tr. 237).

Wherefore, Respondent respectfully prays that the complaint against it be dismissed, and for such other and further relief as may be just and proper.

THOMAS L. SMITH,

LOUIS H. CALLISTER, and
NATHAN J. FULLMER,

By /s/ NATHAN J. FULLMER,
Counsel for Respondent.

Certificate of Service attached.

United States of America
Before the National Labor Relations Board

Case No. 19-CA-948

INTERMOUNTAIN EQUIPMENT COMPANY,

and

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS LOCAL UNION 483

DECISION AND ORDER

On December 8, 1954, Trial Examiner James R. Hemmingway issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that the complaint be dismissed in those respects. Thereafter, the Respondent filed exceptions to the Intermediate Report together with a supporting brief.[1] The General Teamsters, Warehousemen and Helpers Local Union 483, hereinafter called the Union, filed a brief in

[1]The Respondent's request for oral argument is denied as the record, the exceptions and the briefs, in our opinion, adequately present the issues and the positions of the parties.

support of the Intermediate Report. The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudical error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs and the entire record in the case and hereby adopts the findings, conclusions and recommendations of the Trial Examiner:

For a number of years prior to 1953, the Respondent had regularly paid year-end bonuses to substantially all of its employees, including those currently represented by the union. It had also maintained a practice of compensating its employees for absences due to sickness. In June, 1953, the Union was certified by the Board as the exclusive bargaining representative for the warehouse employees and the parties commenced negotiations for a collective bargaining agreement covering these employees. During negotiations the Union proposed, among other things, contract clauses providing for year-end bonus payments equivalent to one month's wages and guaranteed paid sick leave of 6 days per year. The Respondent opposed both on the grounds that the payment of bonuses should remain within the prerogative of management and that if it would guarantee a fixed amount of sick leave the employees would take the maximum amount of time allocated for sickness whether or not they were sick. However, as the Union expressed concern that the Respondent's existing policies on these matters might be changed absent the contract provisions, the

Respondent assured the Union that it saw nothing in the near future that would justify changing the sick leave policy and that it would "treat all employees in [its] employment the same as far as bonuses and sick leave were concerned." Relying upon these representations the Union dropped both demands. In presenting the contract to the employees for ratification, the Union restated the Respondent's assurances concerning bonuses and sick leave. A collective bargaining agreement was signed in July, 1953. Thereafter, without informing the Union, the Respondent immediately instructed the supervisors of the employees represented by the Union to adhere strictly to the terms of the contract and not to give anything except that which was guaranteed by the contract; as a result only time shown as worked by the time clock was paid for and absences because of sickness were no longer approved for compensation. Paid sick leave was continued, however, for those employees not in the unit represented by the Union. Further, in December, 1953, the Respondent distributed the usual year-end bonuses but only to employees outside the bargaining unit represented by the Union.

We agree with the Trial Examiner's findings that this disparate treatment concerning bonuses and sick leave had the inherent effect of discouraging union membership and therefore constituted a violation of Section 8 (a) (3) and (1) of the Act, even absent independent evidence of the Respondent's anti-union

motivation. As the Supreme Court in the Radio Officers' case[2] said:

> This recognition that specific proof of intent is unncessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.
>
> Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage [or discourage] is sufficiently established.[3]

In this case, the Respondent assured the Union that it would not discriminate against the represented employees with respect to bonuses and sick leave. As a result the Union dropped its demands for contractual provisions covering those items, and passed on to the employees the Respondent's assurances, as could be expected. After the contract

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[2]Radio Officers' Union v. N.L.R.B., 74 S. Ct. 323; 33 LRRM 2417.

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[3]If the discussion of the Radio Officers' case in our dissenting colleague's opinion is intended to suggest that the Court did not lay this principle down as one of general application to all discrimination cases, we cannot agree.

was signed, however, the Respondent, without explanation of a non-discriminatory reason for disparate treatment if in fact there was one, and without discussion with the Union, summarily deprived the represented employees of bonuses and paid sick leave while continuing such benefits for the employees not covered by the contract. Under the circumstances we conclude that the effect of this disparate treatment in view of the Respondent's previous asurances that all employees would be treated alike was to cause the represented employees reasonably to believe that the Respondent was punishing them for their union adherence, a result that necessarily discourages union membership. The Respondent must be held to have intended this foreseeable consequence of its conduct irrespective of its actual motivation.

Our dissenting colleague's assertion that the Respondent's previous assurances that all employees would be treated alike can be given no weight in this case absent an inference that they were given as "part of a scheme" to pave the way for reprisals against union members, plainly is not a correct statement of law. These statements were part of the context in which the employer acted and cannot be ignored in deciding whether his disparate action had the natural consequence of discouraging union membership whether the statements were made in all sincerity or not. Justice Frankfurter's concurring opinion in the Radio Officers' case makes this clear

when he explicitly defines the scope of the decision in these words:

> On the basis of the employer's disparate treatment of his employees standing alone, or as supplemented by evidence of the particular circumstances under which the Employer acted, it is open for the Board to conclude that the conduct of the employer tends to encourage or discourage union membership, thereby establishing a violation of the statute. (Emphasis supplied.)

Moreover, we believe that the inference that the Respondent intended to discriminate because of union membership is buttressed by the circumstances. Thus we note that immediately after signing the contract the Respondent deprived the represented employees of their paid sick leave. The immediacy of its action, totally unexplained, would give rise to an inference that Respondent intended to discriminate because of union membership. While several months elapsed before the disparate bonus payments, in the light of the prior action on the sick leave, and the absence again of any explanation to the employees, the same inference could be drawn. It seems unlikely that an employer motivated by no anti-union considerations would deprive only his represented employees of substantial benefits given unrepresented employees and which the former had been led to believe would be continued, without first explaining to them or their representative why the changes were made. The failure to discuss or ex-

plain before acting contrary to its prior statements casts serious doubt on the bona fides of the Respondent's actions and the purity of the motive behind them.

For these reasons we find that the Respondent violated Section 8 (a) (3) and (1) of the Act by discontinuing bonuses and paid sick leave for the employees represented by the Union.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Intermountain Equipment Company, its officers, agents, successors, and assigns shall:

1. Cease; desist from:

(a) Discouraging membership in General Teamsters, Warehousemen and Helpers, Local Union 483 or any other labor organization of its employees by discriminating in regard to the terms or conditions of their employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist General Teamsters, Warehousemen and Helpers, Local Union 483 or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or pro-

tection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole those employees in the collective bargaining unit described in the Intermediate Report, who, during the term of the 1953 contract, suffered a loss as a result of the Respondent's discrimination in withholding bonus and sick leave by paying each of them a sum of money equivalent to that which he would have been paid, absent the discrimination against them in the manner described in the section entitled "The remedy," in the Intermediate Report;

(b) Preserve and make available to the Board or its agents upon request all records necessary to analyze the amounts of bonuses and sick leave payments due under the terms of this Order;

(c) Post at its place of business in Boise, Idaho, copies of the notice attached to the Intermediate Report and marked "Appendix."[4]

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[4]This notice shall be modified by substituting the words "A Decision and Order" for the words "The Recommendations of a Trial Examiner." In the event this Order is enforced by a decree of a United

Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps the Respondent has taken to comply herewith.

It Is Further Hereby Ordered that the Complaint insofar as it alleges that the Respondent violated Section 8 (a) (5) be, and it hereby is, dismissed.

Dated, Washington, D. C., Dec. 16, 1955.

ABE MURDOCK,
Member;

IVAR H. PETERSON,
Member,

[Seal] NATIONAL LABOR RELATIONS BOARD.

States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Boyd Leedom, Chairman, dissenting:

I would not find that the Respondent violated Section 8 (a) (3) of the Act by discontinuing sick leave privileges and year-end bonus payments to its represented employees while continuing such benefits for its unrepresented employees.

It is well settled that to establish a violation of Section 8 (a) (3) of the Act it is necessary to show not only that the employer discriminated but also that the purpose of the discrimination was to encourage or discourage union membership or activity. It is true that, as the Supreme Court stated in the Radio Officers case[5], such purpose may be inferred, in the absence of any direct evidence of motivation, where the discrimination is of such a nature that it inherently encourages or discourages union membership. In that case the Court affirmed a Board finding that the granting by an employer of certain benefits to union members while denying them to other employees in the same bargaining unit and doing the same work violated Section 8 (a) (3). The Court held, in effect, that it was so clearly foreseeable that such contrasting treatment of union and nonunion employees would encourage union membership that it was unnecessary to adduce any further proof that the employer intended such encouragement. The Court indicated also that under such circumstances an employer's disclaimer

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[5]Radio Officers' Union v. N. L. R. B., 74 U. S. Ct. 323.

of any intent to encourage would be unavailing. The Court made it clear that its decision was limited to the facts before it and it was not passing on the legality of preferred treatment of union members where they alone were represented by the union. Thus it appears that the Radio Officers case leaves open the question of the legality of preferred treatment of nonunion members not represented by any union, which is, in part, the issue here.

From the foregoing it appears that Radio Officers, insofar as here pertinent, holds merely, in effect, that the Board may infer intent to encourage or discourage union membership (a) where there is no countervailing evidence other than the employer's naked disclaimer of any such intent[6], and (b) where the treatment of union employees is obviously more favorable than the treatment of nonunion employees.[7] In my opinion, neither of these conditions is present here.

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[6]This aspect of the majority opinion in Radio Officers is highlighted in Justice Frankfurter's concurring opinion in that case, which reads in part: "* * * concededly a raise given only to union members is prima facie suspect; but the employer, by introducing other facts may be able to show that the raise was so patently referrable to other considerations, unrelated to his views on unions * * * that the Board could not reasonably have concluded that his conduct would encourage or discourage union membership.

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[7]While the Court left open the question whether it would extend the rule of Radio Officers to the case where the union, as in the instant case, represents only its members, it will be assumed for the

As to (a), there is persuasive evidence, apart from the Respondent's disclaimer, that it had no antiunion motivation in continuing the benefits in question for nonunion employees, while denying them to union employees. The Respondent, in 1953, executed a contract with the Union which not only guaranteed substantial new benefits to its members but also granted the Union the protection of a union shop clause. It is difficult to believe that the respondent would have required its employees to join the Union if it were seeking to undermine it. As against this, the only evidence, other than the alleged disparate treatment, itself, that has been cited as indicating the Respondent's antiunion motivation is the fact that the Respondent made statements at the contract negotiations which tended to create the impression that it would continue the bonus and sick leave for all employees and that the Respondent failed to give the Union any advance notice or explanation of its decision to discontinue those benefits. It is not clear to me, however, how this conduct of Respondent, even if we assume it to be equivocal, can overcome the convincing and unequivocal proof of the Respondent's nonhostility to the Union implicit in the grant of a union shop clause. Moreover, any disparity between the Respondent's statements during negotiations and its

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purpose of the ensuing discussion that the fact the Union in the instant case did not represent the nonmember employees involved does not, in itself, preclude the application of Radio Officers hereto.

conduct thereafter seems to me explainable by the fact that such statements were made at the outset of the negotiations, before the Union had presented its demand for a 26c an hour wage increase. The Union's insistence on such a large increase may well have caused the Respondent, for legitimate economic reasons, to alter its plans with regard to continuing the noncontractual benefits. Accordingly, even apart from the implications of the grant of a union shop here, I would be unwilling to infer that the oral assurances given by the Respondent in the early stages of the negotiations were part of a scheme to pave the way for a program of reprisal against the Union and its members. If, then, they were not part of such a scheme, it seems to me they are not entitled to any weight in appraising the Respondent's motivation.

As to (b), it is not established that the benefits conferred by the Respondent on its unrepresented employees (year-end bonus and paid sick leave) exceeded in aggregate value the benefits conferred on the represented employees by the 1953 contract (i.e., a 26 cent hourly raise, paid holidays and vacations, seniority rights, premium pay for overtime). On the basis of a 40-hour week, the wage increase alone was worth $500 a year to each Union member. What little evidence there is in the record on this point suggests that the value of the bonus may have been substantially less than this amount. As to the relative value of the sick leave privilege,

on the one hand, and the various fringe benefits conferred by the Employer on the organized employees, the record is silent. In any event, there is no basis in the record for finding that the treatment of the unorganized employees was, in the aggregate, obviously more favorable than the treatment of the organized employees.

It is true, if one considers in insolation the fact that the Respondent withdrew bonus and sick leave from the organized employees but not from the unorganized employees, such conduct standing alone might warrant finding an obvious disparity in treatment. Viewing, the respondent's withdrawal of these benefits in the context of all other relevant circumstances, however, such as what it and the Union agreed to in the contract, one cannot escape the conclusion that in essence what the respondent did was to guarantee to its organized employees a substantial wage increase and other benefits in lieu of the pre-existing bonus and paid sick leave, while continuing the bonus and sick leave for the unorganized employees who failed to receive any wage increase or other new fringe benefits. If an employer grants a 10 cents per hour raise to his organized employees, I should think he would be free, if not required, to extend the same increase to his unorganized employees.

By the same token, when an employer grants to his organized employees alone a wage increase in lieu of an existing bonus he should be free to continue to pay the bonus to his unorganized em-

ployees. That is essentially what happened here. Finally, where, as here, a union acquiesces in management's insistence upon omitting from a contract any reference to existing benefits, I believe that the only realistic view of the matter is that the union and its members have been put upon notice that management is reserving the right to discontinue such benefits.[8] As no arrangement was made in the contract for a continuing bonus or sick benefits, it follows that the actual exercise of the right to discontinue something not included in a contract is a foreseeable result of the collective bargaining process. It is a risk inherent in that process which the Union and its members assumed when they elected to engage in collective action. For these reasons, I would not find that the Respondent's action in discontinuing the bonus and sick leave, even if patently disparate, inherently discouraged union membership.

Accordingly, I would not find any violation of Section 8 (a) (3) in the instant case.

Dated, Washington, D. C., December 16, 1955.

BOYD LEEDOM,
Chairman, National Labor
Relations Board.

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[8]I do not mean here to pass upon the question whether the exercise of such a right would violate Section 8 (a) (5) of the Act. I am merely attempting to appraise the realities of the situation.

Before the National Labor Relations Board,
Nineteenth Region

Case No. 19-CA-948

In the Matter of:

INTERMOUNTAIN EQUIPMENT COMPANY,

and

GENERAL TEAMSTERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 483.

TRANSCRIPT OF PROCEEDINGS

Tuesday, September 28, 1954

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a.m.

Before: James R. Hemingway, Esq.,
Trial Examiner.

Appearances:

PAUL E. WEIL, ESQ.,
Appearing as Counsel for the General Counsel.

THOMAS L. SMITH, ESQ., and
PHILIP A. DUFFORD,
General Manager, Intermountain Equipment Company.
Appearing on Behalf of Intermountain Equipment Company, Respondent.

REID W. NIELSON, ESQ., and
F. T. BALDWIN,
Secretary-Treasurer, General Teamsters, Warehousemen and Helpers, Local Union 483.
Appearing on Behalf of General Teamsters, Warehousemen and Helpers, Local Union 483, Charging Party.

Trial Examiner: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Intermountain Equipment Company and General Teamsters, Warehousemen and Helpers, Local Union 483, Case Number 19-CA-948. The Trial Examiner conducting this hearing is James R. Hemingway.

I note the following appearances for the parties in this case:

Mr. Paul E. Weil, attorney, 19th Region, National Labor Relations Board, Seattle, Washington; appearing as counsel for the General Counsel.

Mr. Philip A. Dufford, general manager; and Mr. Thomas L. Smith, attorney, on behalf of the Intermountain Equipment Company, respondent in this case. Mr. Dufford's address is the same as that of the Intermountain Equipment Company, Broadway and Myrtle, Boise, Idaho; and Mr. Smith's address is 319 Broadway, Boise, Idaho.

Reid W. Nielson, attorney-at-law, 416 Felt Building, Salt Lake City, Utah; and Mr. F. T. Baldwin, secretary-treasurer, 208 North Sixteenth Street, Boise, Idaho, on behalf of the charging party.

Are there any other appearances that should be entered?

(No response.)

Trial Examiner: Hearing none, I will [4*] proceed.

* * *

Trial Examiner: On the record.

I wanted to call Mr. Weil's attention to the fact that there may be inherent difficulties in getting some of this material for him by virtue of the fact that the respondent might not know which employees were absent because of illness or for other reasons.

Mr. Weil: I spoke to Mr. Dufford about that, and it appears that there is no such record kept. This I, of course, was not aware of when I subpoenaed such records.

Trial Examiner: There was no record kept of those who were granted sick-leave?

Mr. Weil: That is what he informed me.

Trial Examiner: Well, that simplifies that. [21]

* * *

FRANK T. BALDWIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your full name, please?

The Witness: Frank T. Baldwin.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Frank T. Baldwin.)

Trial Examiner: And your home address?

The Witness: 608 Shoshone.

Trial Examiner: Is that in Boise, Idaho?

The Witness: Boise, Idaho.

Q. (By Mr. Weil): What is your occupation, Mr. Baldwin?

A. Secretary-treasurer of Local 483.

Q. What union?

A. General Teamsters, Warehousemen and Helpers, A.F.L.

Trial Examiner: That is the charging Union in this case?

The Witness: Yes.

Q. (By Mr. Weil): In the course of your occupation, have you had any occasion to enter into any relationships with the respondent, Intermountain Equipment Company? A. Yes.

Q. When did you first have anything to do with the respondent company? [23]

A. It was after the election was held. The board ordered an election, and we were certified on it on or or about June 3rd.

Trial Examiner: What year?

The Witness: 1953.

Q. (By Mr. Weil): Did you take steps to initiate bargaining after your certification?

A. Yes.

Q. Did you have any bargaining meetings with the respondent? A. Yes.

Q. Will you give us, as nearly as you can recall, the—well, relate the course which bargaining took?

(Testimony of Frank T. Baldwin.)

A. Well, I met with Mr. Dufford on about June 3rd and discussed with him the procedure of the Union in drawing up the contract, the employees asking for the things they wanted in the contract; we would then have a meeting and negotiate back and forth. On July 22, 1953, I believe, we entered into negotiations, myself, two employees, Stewart and Buntin, Mr. Dufford, and Ray Fortune.

Trial Examiner: For whom? Mr. Fortune was for whom?

The Witness: For the Company.

A. He was the labor relations manager for Morrison-Knudsen Company, sitting in with Mr. Dufford. And in the morning meeting, the first meeting we held, July, I believe, 22, we generally discussed the contract provisions, went through the contract paragraph by paragraph.

Trial Examiner: When you say "the contract," had you [24] made a proposed contract?

The Witness: Proposed contract, yes.

A. (Continuing): Discussing each paragraph and explaining to the Company what we wanted and why we wanted them and so forth. Just a general meeting on the contract, the proposed contract. We adjourned and reconvened in the afternoon. We were asking for wages, union shop, a paragraph to be inserted in the contract on bonuses and sick-leave. A general discussion was held on the afternoon of the 22nd. The Employer, Mr. Dufford, was opposed to the union shop. He didn't under-

(Testimony of Frank T. Baldwin.)

stand the meaning of the union shop. We discussed that a while, and we came to the paragraph on bonuses and sick-leave, and Mr. Dufford took the position that bonuses were a company prerogative, and he didn't want them in the contract. And sick-leave, he took the position that we were asking for six days sick-leave a year, and that if a sick-leave was put in the contract, all the employees would take the sick-leave regardless of whether they were sick or not. And I explained to him that in several of our contracts where we have sick-leave, that was not true, and in one case where only 65 per cent of the employees used the sick-leave, the balance not using any sick-leave at all.

Then we adjourned and met the next day, I believe, the 23rd of July. The meeting was rather rough, if you know what I mean, negotiations. And Mr. Fortune explained the union shop also to Mr. Dufford, that the meaning of the thing—can we go off the [25] record for a minute? Do you want to use the language we used?

Trial Examiner: Ask counsel what he wants.

Mr. Weil: I think it would be better to use the language used in the conversations as much as you can recall.

A. Well, Mr. Fortune, I have dealt with him for years and years, and he was rather rough about the the thing. So on the union shop, he finally turned to Mr. Dufford and said to him, "You will never get this son-of-a-bitch to agree without a union shop. You might as well make up your mind to that

(Testimony of Frank T. Baldwin.)

right now." And that was worked out to a certain extent. We wanted the union shop to read thirty-one days to conform with the Taft-Hartley Law, and Mr. Dufford wanted six months. We offered to settle on a 90-day period. We finally reached an agreement on his theory of six months on the union shop.

The bonus situation and sick-leave was then the issues, and Mr. Dufford again took the position that he would not put them in the contract and said that he would treat all employees in his employment the same as far as bonuses and sick-leave were concerned. And I informed him if he paid the people outside the unit bonuses and did not pay the people in the unit bonuses, that we would consider it discrimination.

And we were then talking about sick-leave, and he took the same position that it was a company policy, if they paid them one, they would pay them all. And we were arguing, myself and Mr. Fortune were arguing back and forth. To the best of [26] my memory, the conversation went like this: in the heated argument, or the rather warm argument, Mr. Fortune said to Mr. Dufford, "Well, get the monkey on this fellow's back"—meaning myself—and I said to Mr. Fortune, "If you don't keep your trap closed, you will get your teat in a wringer, and I will go over and organize your other employees." And he said, "Well, you had an agreement with Mr."—he was the vice president—"Mr. Puckett that you would not organize the other employees."

(Testimony of Frank T. Baldwin.)

And I said, "That is right, but Mr. Puckett's dead now, and the verbal agreement went with Mr. [27] Puckett."

* * *

Trial Examiner: Who was Mr. Puckett?

The Witness: He was, I believe, the vice president of Morrison-Knudson, and the person we used to negotiate and counsel with for years, this local union.

A. (Continuing): So that stopped the argument as far as that was concerned. Then Mr. Fortune turned to Mr. Dufford and said, "I will tell you one thing, whatever this son-of-a-bitch tells you he will do, that is exactly what he will do." And then Mr. Fortune turned to me and said, "And that goes for Phil. Whatever he tells you he will do, that is exactly what he will do."

Trial Examiner: "Phil" being Mr. Dufford?

The Witness: Mr. Dufford.

A. (Continuing): So I asked for a few minutes' recess. The two employees who were sitting in on the negotiations, Speed Stewart and Roy Buntin, and I, went across the hall to consider this. And I asked them across the hall if they believed that Mr. Dufford would do what he said he would do as far as bonuses and sick-leave were concerned. And I don't remember which one of the boys said, "Well, he has always paid us a bonus, and we believe him," and the other boy chimed in and said, "Whatever he says he will do, that is what he will do." So I then dismissed it from my mind, and we

(Testimony of Frank T. Baldwin.)

came back to the office and reached an agreement on the wages and finally on the union shop, the [28] rest of the contract on holidays, and forgot about the bonuses and sick-leave.

Then we met again on the, on or about the 27th to put all the paragraphs together and finally agree on them. And then the union shop was changed, as I said a few minutes ago, from thirty days which we wanted to six months.

And Mr. Dufford and I met again in his office on the 28th, and the contract was signed. [29]

* * *

Q. (By Mr. Weil): You entered into a written contract? A. Yes, sir.

Q. Handing you what has been marked as General Counsel's Exhibit No. 3 for identification, I will ask you if that is a [30] copy of that contract?

A. Yes.

* * *

Mr. Weil: I offer General Counsel's Exhibit No. 3 for identification.

Mr. Smith: No objection.

Trial Examiner: General Counsel's Exhibit No. 3 is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification was received in evidence.) [31]

(Testimony of Frank T. Baldwin.)

GENERAL COUNSEL'S EXHIBIT No. 3

Wage Scale and Agreement

This Agreement, Made and entered into this 27th day of July, 1953, by and between Intermountain Equipment Company, this party being referred to hereinafter as the Company, and General Teamsters, Warehousmen & Helpers of America, A. F. of L., Local Union No. 483, affiliated with the International Brotherhood of Teamsters, Warehousemen & Helpers of America, A. F. of L., this party being referred to hereinafter as the Union.

Preamble. That, Whereas, The parties hereto desire to encourage and promote a cooperative and mutually satisfactory relationship between Employer and the employees in the bargaining unit with respect to conditions of employment; to prevent strikes and lockouts and to provide for the peaceable solution of all disputes which may arise between Employer and said employees.

Now, Therefore, In consideration of the promises, covenants, and agreements of the other, each of the parties hereto agree as follows:

Article I. Recognition. The Union is hereby recognized as the sole collective bargaining representative of those employees in the unit certified under NLRB Certification No. 19-RC-1290.

Article II. Employment. All present employees, covered by this unit, as a condition of continued employment, shall become members of the Union not

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

later than the sixtieth (60th) day following the effective date of this agreement. All future employees hired for work within this unit, as a condition of continued employment, shall become members of the Union not later than the sixtieth (60th) day following the beginning of their employment. Commencing with the sixtieth (60th) day of either period described above, whichever is the later, all employees present and future, shall be required to maintain a continuous membership in the Union in good standing, as a condition of employment during the life of this agreement.

Article III. Rights of Management. The products, location of business, the right to hire, fire, and promote, shall be the sole responsibility of the Company's management.

Article IV. No employee who, prior to the date of this agreement, was receiving more than the rate of wages designated and agreed upon, contained herein for the class of work in which he was engaged, shall suffer a reduction of hourly wage rate through the operation or because of the signing of this agreement.

Article V. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a work week. All time worked over eight (8) hours in one day or forty (40) hours in one week shall be considered overtime and paid for at the rate of time and one-half.

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

(a) The starting and closing time shall be at the option and discretion of the Company, except that no split shifts shall be worked.

Article VI. Any claim for wages must be presented to the Employer in writing within thirty (30) days of the day employee is paid for the period in which wages are claimed.

Article VII. Employees covered by this agreement when drafted for Military Service shall be reinstated upon their release from such service in accordance with the provisions of the Selective Training and Service Act, except that there shall be a 90-day probationary period of employment before the seniority shall apply.

Article VIII. Vacations. After one year's continuous service, an employee shall be entitled to one week's vacation at the regular rate of pay. After three (3) years of continuous service, an employee shall be entitled to two weeks vacation at the regular rate of pay.

Article IX. Holidays. The following six (6) holidays shall be granted at regular straight pay: January 1st, July 4th, Labor Day, Memorial Day, Thanksgiving Day and Christmas Day. If work is performed on any of these days, pay shall be at the rate of time and one-half. Holidays not worked shall count as time worked in computing overtime.

Article X. Seniority. When it becomes necessary to reduce the working force of the company or

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

upon rehiring following a reduction in force, where merit, ability, and capacity are equal, seniority shall prevail.

(a) All newly hired employees shall be considered probationary for the first six (6) months of continuous employment, after which time seniority shall commence from the date of hire.

Article XI. Wages. Following is the minuimum scale of wages:

Bracket No. 1

Wages

Receiving & Shipping Room

	Starting Wage	Wage After 6 Months Probationary Period
Clerks	$1.30	$1.50
Pricing Clerks	1.30	1.50
Counter Men	1.30	1.50
Order Clerks	1.30	1.50

Bracket No. 2

Wages

Checker	$1.20	$1.40
Packers	1.20	1.40
Delivery Men	1.20	1.40
Inventory Men	1.20	1.40
Warehouse Employees	1.20	1.40

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

Extra men when called shall be paid a minimum of four (4) hours per call. No extra men shall be called until the permanent forty (40) hours crew has been established. Any time worked over four (4) hours continuously in the higher bracket, shall be paid the high bracket rate of pay for the hours worked. Work performed under this clause shall be reported by the employee to the foreman in charge of the employees in the unit.

Paydays shall be on the basis determined by the Company, but not more frequently than once per month.

Article XII. Grievances or Disputes. Any employee or group of employees, having grievances or disputes, shall present them in the following manner:

(1) Take up the grievance or dispute with the foreman within three (3) working days of date of its appearance.

(2) If not properly settled at that stage, the grievance or dispute shall be reduced to writing and shall be taken up between a representative of the Union and a representative of the Company.

(3) The Company shall give its answer to the written grievance or dispute in writing, within three (3) works days after its presentation.

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

(4) If the Company's answer is unsatisfactory, a board of Arbitration shall be created. When and if an Arbitration Board is created, said Board shall consist of two (2) representatives of each party hereto. The Board of Arbitration shall give its decision within a time limit not to exceed seven (7) working days, not including Saturdays, Sundays, or legal holidays.

(5) The findings and decisions of the Arbitration Board shall be final and binding by both parties.

(6) In the event the four (4) members of said Board of Arbitration cannot agree, a fifth member will be selected by the Board. In case the four (4) members of the Board of Arbitration cannot agree upon a fifth member within seven (7) working days, then, and in that event, the United States Conciliation Service shall designate the fifth member.

(7) The expense of such fifth member of the Board shall be borne equally by both parties.

(8) The Board of Arbitration as hereunder set forth, shall not handle negotiations for a new agreement, or changes in the Wage Scales, Hours of Work, or Working Conditions, which are a part of this Agreement.

This Agreement is to continue and remain in full force and effect and to be binding upon the respective parties hereto from July 27, 1953, until July 27, 1954. Either party, desiring to change this

(Testimony of Frank T. Baldwin.)

General Counsel's Exhibit No. 3—(Continued)

Agreement, shall give notice to the other party of a desire to change, at least sixty (60) days prior to the date of expiration of this Agreement. Such notice shall include any proposed changes.

GENERAL TEAMSTERS, WAREHOUSEMEN, AND HELPERS, LOCAL No. 483,

By /s/ F. T. BALDWIN,
Secretary-Treasurer,
Teamsters Local No. 483.

INTERMOUNTAIN EQUIPMENT COMPANY,

By /s/ PHILIP A. DUFFORD,
Vice Pres., Gen. Mgr.

Received in evidence September 28, 1954.

* * *

Q. By Mr. Weil): Have you in your capacity with the Union at any time since July 28, 1953, requested respondent to pay sick-leave to employees who were sick? A. Yes.

Q. At what time?

A. Well, I talked to Mr. Dufford on or about January 4.

Trial Examiner: This year?

The Witness: Yes, before we filed charges.

(Testimony of Frank T. Baldwin.)

Q. (By Mr. Weil): Where did you speak to Mr. Dufford?

A. I talked to him by telephone.

Q. Did you speak to him at any other time about the payment of sick-leave?

A. About sick-leave, no. I did about the bonuses.

Q. When you called Mr. Dufford, where did you call him or did he call you?

A. No. I called him from my office. I told him it was my [32] understanding that some of the boys will be denied the sick-leave, had been docked for the sick-leave, and was he going to pay them, and he said no. He still took the position that was the Company's prerogrative, and that was the end of the conversation.

Trial Examiner: You say that was the end?

The Witness: Yes.

Q. (By Mr. Weil): Did you call to his attention any promises that you considered him to have made?

A. Not on sick-leave, no. On bonuses, we had——

Mr. Smith: Shouldn't the witness confine himself to the questions?

Trial Examiner: Yes. Wait until a question is asked. As I understood you, you said that that was all of the conversation that you had by telephone that day?

The Witness: Pertaining to sick-leave, that is all.

Trial Examiner: Was there more to the conversation?

(Testimony of Frank T. Baldwin.)

The Witness: Just general conversation. That was all on the sick-leave. [33]

* * *

Mr. Weil: * * * Now, that being the case, I believe at this time I may make the entire matter more clear and definite by asking permission to amend Paragraph IX of the complaint to read, to strike the word "some" and to read "On or by December 25, 1953, respondent paid bonuses to substantially all of its employees who are not members of the Union," et cetera. [37]

* * *

Mr. Weil: Yes.

Trial Examiner: In view of the fact that the basis of the complaint is a discrimination, I believe that it is permissible at this time to amend that complaint as moved. So I will grant the [38] motion.

* * *

Mr. Weil: Do I understand you to say that the respondent has paid the sick leave and bonus with which we are concerned in this case?

Mr. Smith: No, but——

Mr. Weil: Do I understand that respondent has paid any sick-leave or bonus as a result of the filing of this charge? [43]

Mr. Smith: No. [44]

* * *

Trial Examiner: On the record.

Because of my original misunderstanding as to

(Testimony of Frank T. Baldwin.)

the scope of General Counsel's motion to strike, I think it becomes necessary for me to revise my first ruling with reference to the paragraph starting on the bottom of Page 2 of the respondent's amendment to the answer, the so-called "wherefor" clause.

Now, I originally considered it immaterial and, for that reason, had decided not to strike it, but in view of the fact that it does go to the same material as in Paragraph V of the amendment to the answer, I feel that my original ruling requires an amendment. Inasmuch as the first clause of the "wherefore" paragraph is an indirect denial of the complaint, I will permit that to stand, but I will grant the motion to strike the balance of that paragraph. [47]

* * *

Direct Examination
(Continued)

By Mr. Weil:

Q. You testified that you first contacted the respondent on June 3, 1953, after the election. Is that your present belief, that that is the correct date?

A. No, July 3rd.

* * *

Trial Examiner: Ask him if he knows when the election certification was issued.

The Witness: It was on the 18th or the 26th of June. I contacted him on July 3rd rather than June, as I stated this morning. July 3rd was the first meeting I had with him.

Q. (By Mr. Nielson): Mr. Baldwin, how many

(Testimony of Frank T. Baldwin.)

meetings did you have with the Company with reference to this contract? A. In negotiations?

Q. Yes. [48]

A. Six, including the one that the contract was signed at.

Q. Going back to the first one, you state that on July 3rd you had your meeting. Who was present besides yourself? A. On July 3rd, no one.

Q. Who else was present?

A. Mr. Dufford.

Q. And yourself? A. Yes, sir.

Q. That is all? A. Yes.

Q. As I understand it, that was merely a preliminary meeting? A. That is right.

Q. What time or at what meeting, at what instance was your proposed contract delivered to the Company?

A. On the morning of July 22nd, I believe.

Q. Now, that was a meeting set up where?

A. At the Company's office on South Broadway.

Q. In Boise? A. In Boise.

Q. Now, I think you testified that there were other people there besides yourself. Who were they?

A. For the employees on the Union side was Speed Stewart, Roy Buntin, myself; and on the employer's side was Mr. Dufford, Ray Fortune.

Q. Now, Mr. Buntin and Mr. Stewart, they were present as a [49] negotiating committee for the Union? A. Yes, elected by the membership.

Q. And they were aiding you in negotiations?

A. Yes.

(Testimony of Frank T. Baldwin.)

Q. Now, Mr. Dufford, who is he?

A. He is the manager, I believe, of the Intermountain Equipment Company, president.

Q. And Mr. Fortune, who is he?

A. He was the labor relations manager for Morrison-Knudsen.

Q. Do you know in what capacity he was present?

A. I imagine to assist and help Mr. Dufford.

Trial Examiner. Don't imagine, please. Do you know?

The Witness: Well, he was assisting and helping Mr. Dufford.

Q. (By Mr. Nielson): Was there any conversation had with Mr. Dufford as to the status of Mr. Fortune?

A. Mr. Dufford asked me if I had any objections to Ray sitting in and helping him with negotiations, and I said no.

Trial Examiner: That is Ray Fortune?

The Witness: Yes.

Q. (By Mr. Nielson): And Mr. Fortune attended those meetings and was present in that capacity?

A. Yes. At the last meeting, I don't believe he was present.

Q. But he was present at the July 22nd meeting? A. Yes. [50]

Q. In reference to your six meetings, are you classifying more than one meeting being held on one day?

(Testimony of Frank T. Baldwin.)

A. Yes, there was more than one held on one day.

Q. In other words, would you say, then, that there were two meetings held on the 22nd?

A. Yes.

Q. Was any discussion had in that first meeting on July 22nd, with reference to the bonus or sick leave?

A. Only that we had it included in our proposal.

Q. And that was a written proposal?

A. Yes.

Q. Given to the Company at that time?

A. Yes.

Q. And there was no further discussion on it at that time?

A. Not in that morning meeting, no.

Q. Was there any discussion on it in the afternoon meeting?

A. Yes, there was some discussion on it. Not too much, however. We were going through the contract paragraph by paragraph, trying to explain to Mr. Dufford why we were asking for these things and the interpretation of each paragraph.

Q. When did you have the next meeting?

A. It was along the 23rd.

Q. That would be the following day?

A. Yes.

Q. Who was present at that meeting? [51]

A. Myself, Speed Stewart, Roy Buntin, Mr. Dufford, and Ray Fortune.

Q. And where was that meeting held?

A. At the Company offices.

Q. In Boise? A. In Boise.

(Testimony of Frank T. Baldwin.)

Q. Approximately what time, if you recall?

A. I believe 10 o'clock, as near as I can remember.

Trial Examiner: 10 in the morning?

The Witness: Yes.

Q. (By Mr. Nielson): What discussion was had there with reference to sick leave and bonuses, if you recall?

A. Well, that morning the meeting got quite warm over bonuses and sick leave. The contract—in other words, we had agreed on portions of the contract, but bonuses, sick leave, union shop, and wages were as yet unsettled. And bonuses and sick leave was the discussion that morning.

Q. Did you have a further meeting with the Company? A. In the afternoon, yes.

Q. In the afternoon. And the subjects of bonuses and sick leave were discussed there? A. Yes.

Q. And the same people were present that afternoon? A. Same, yes.

Q. Did Mr. Fortune take part in the discussion of sick leave [52] and bonuses at that meeting?

A. Yes.

Q. And Mr. Dufford? A. Yes.

Q. Now, did you have a further meeting with the Company?

A. Yes, on the, on or about the 27th, as nearly as I can remember.

Q. What was discussed there?

A. Well, the issue then was the wages and union shop.

(Testimony of Frank T. Baldwin.)

Q. Now, I think in your prior testimony, you have testified that you agreed upon a union shop clause after a six months' period. Is that correct?

A. We were asking for 31 days, a union shop, including 31 days, and Mr. Dufford first asked for six months' union shop clause, and we compromised on 60 days' union shop, I believe. Anyway, we compromised in between there, 60 days.

Q. Then your former testimony would be incorrect, is that right?

A. I believe I said this morning that he wanted six months, and we wanted thirty days, but we compromised on ninety days.

Trial Examiner: Your testimony this morning was that at first, and then you settled on six months, so I left it hanging there.

The Witness: I meant to say sixty days. The Company wanted six months, and we wanted thirty-one days, and we compromised [53] and settled on sixty days.

Q. (By Mr. Nielson): I think you testified this morning, also, that you had one discussion with Mr. Dufford, the manager, subsequent to January 1 on sick leave. Is that correct?

A. January 4th, I believe it was. [54]

* * *

(Testimony of Frank T. Baldwin.)

Cross-Examination

By Mr. Smith:

Q. Mr. Baldwin, you testified, I believe, that you had had no contact with the respondent prior to the certification, and there was some amendment to your direct testimony. Would you repeat what contact you had with respondent prior to certification, if any? A. You mean before the election?

Q. Prior to certification, that is, after the election and—it could be before the election, yes—before the results of the election were certified.

A. Well, I think I talked to him, as I do all employers, previous to the election, to the certification. As a matter of fact, we had a hearing here in this building on the consent agreement, and I talked to him then. [55]

* * *

Q. I see. Now, your first meeting with respondent relative to entering into negotiations was on what date? A. Oh, July 3rd, I believe.

Q. July 3rd? A. Yes.

Q. Did you not testify on direct that you had some conversation with Mr. Dufford on or about June 27?

A. Well, that date was wrong. It was July. The election wasn't certified until——

Q. Well, Mr. Baldwin, if I heard the direct examination properly, at first you testified that you first contacted Mr. Dufford June 3, and then you

(Testimony of Frank T. Baldwin.)

changed that date to June 27, and now it is July 3. Which date do you refer to? [56]

A. It would be July 3rd.

Q. July 3? A. Yes.

Q. That was the first conversation you had with Mr. Dufford relative to negotiations?

A. That is right.

Mr. Weil: Counsel, I don't believe that he testified June 27th. He testified that the certification was issued about June 27th, and from that he deduced it was July 3rd.

Mr. Smith: I believe the record will disclose.

Trial Examiner: I believe it will. That is, the record will speak for itself.

Mr. Smith: Yes.

Trial Examiner: My recollection is the same as Mr. Weil's.

Q. (By Mr. Smith): The first time, Mr. Baldwin, that you met with respondent, with Intermountain Equipment Company, was what date? This was not talked to them, but met with them.

A. If any memory serves right, it was July 22nd.

Q. July 22nd? A. Yes.

Q. As I recall your direct testimony, it was at the Intermountain Equipment Company's offices?

A. Yes.

Q. And, as I recall, also, your two stewards, Mr. Speed Stewart—is that correct? [57] A. Yes.

Q. And Mr. Buntin, they were present there with you? A. Yes.

Q. Now, you testified that these gentlemen bar-

(Testimony of Frank T. Baldwin.)

gained with you? A. Yes.

Q. With the employer and its representatives, is that correct? A. Yes.

Q. Do Mr. Stewart and Mr. Buntin have independent authority to bargain on behalf of the unit?

A. No one, including myself, has that authority. It all has to go back to the unit and be settled with a vote.

Q. Can they sign a bargaining contract?

A. No.

Q. Who can sign a bargaining contract?

A. I can.

Q. You can? A. Yes.

Q. Can you negotiate a bargaining agreement without the Union?

A. No—did you say without approval of the Union?

Q. That is correct. A. No, I can't.

Q. Every proposal of the employer is carried by you to the Union membership?

A. That is right.

Q. Is put to a vote? [58]

A. That is right.

Q. This is the Union membership and not merely those people in the bargaining unit, is that correct?

A. Only the people in the bargaining unit. [59]

* * *

Q. (By Mr. Smith): You testified on direct examination that you understood that Ray Fortune was present at these negotiations to assist Mr. Dufford and advise him, is that correct?

(Testimony of Frank T. Baldwin.)

A. Yes. [62]

Q. You recognized, did you not, that Mr. Dufford was the bargaining authority for the Intermountain Equipment Company?

A. Well, I assumed he was. He never had told me that Fortune had no authority, however. He asked me if I had any objections to Mr. Fortune sitting in, helping and assisting him, and he said that he didn't know too much about Union contracts, and he wanted some help. And I said I most certainly welcomed Mr. Fortune because I had dealt with him for years.

* * *

Q. Yes. You say on July 22nd you met Mr. Dufford and at that time Mr. Dufford asked you if it would be all right if Mr. Fortune sat in, and, therefore, Mr. Fortune did sit in on that meeting. Those present at that meeting were yourself, Mr. Buntin, and Mr. Stewart for the Union and Mr. Fortune and Mr. Dufford for the respondent company, Intermountain Equipment Company. Is that [63] correct?

A. I also believe—I don't know who he was—some old gentleman came for a little while, and then he got up and left, and I believe that Mr. Dufford, Phil said——

Q. (Interrupting): Well, that is immaterial. And the issues discussed on July 22, 1953, in the morning—that was meeting Number One by your count of such meetings? A. Yes.

(Testimony of Frank T. Baldwin.)

Q. Was merely the processed contract, that is, the proposal of the Union, submitted?

A. Yes, it was discussing back and forth our proposal which we had presented to the Company.

Q. All right. In that proposal, would you mind restating what were the principal items that you asked for?

A. Well, there was an entire new agreement. We were asking, of course, for everything that was in the agreement.

Q. Well, the principal items?

A. Well, it would be wages, hours, working conditions, and the term of the agreement, and the bargaining unit recognized in the contract.

Q. And you testified also, I believe, that bonuses and sick leave were asked for?

A. That is right.

Q. And you requested originally sick leave for six days, I believe you testified?

A. I believe that is right. I believe six days is right to [64] the best of my knowledge.

Q. What was the amount of bonus you requested?

A. I believe the equivalent of one month's pay.

Q. Did Mr. Dufford or Mr. Fortune make any statement that morning as to the bonuses?

A. It was discussed some with Mr. Dufford taking the position that that was a Company prerogative. And it wasn't discussed too much at all in the first meeting. We were just getting generally an over-all picture of the proposal.

(Testimony of Frank T. Baldwin.)

Q. What mention was made of sick leave by Mr. Dufford for the Company?

A. The first meeting, now?

Q. Yes.

A. Just a general discussion. There was nothing, no discussion on any one paragraph of the contract. It was all discussed, and he was discussing sick leave and bonuses, that he thought that was up to the Company. Just a general discussion.

Q. At no time was there a refusal to bargain on the part of the Intermountain Equipment Company? A. You mean during the first meeting?

Q. Yes. Any of the meetings.

A. No. They never refused to bargain, no.

Q. When was the first time that you had considerable discussion about bonuses and sick leave?

A. I believe it was the second meeting, meeting on the second, [65] on the second or the first meeting on the second day.

Q. That would be the third meeting, is that correct? A. Yes.

Trial Examiner: 23rd, was it?

The Witness: If my memory is right, it was the morning of the 23rd, that meeting.

Q. (By Mr. Smith): And, I believe, you testified that these issues were warmly discussed?

A. They were, especially in the afternoon meeting.

Q. What do you mean by warmly?

A. Well, I could go into the discussion that we

(Testimony of Frank T. Baldwin.)

had this morning, my testimony this morning, with Fortune and myself—Mr. Dufford wasn't too involved in the thing, Mr. Dufford taking the stand——

Q. What do you mean by "warmly"? How do you define the word or use this word?

A. Well, where one side gets irritated, and the other side gets irritated, and you proceed to pound the table a little bit and——

Q. (Interrupting): There was heated discussion, in other words? A. That is it.

Q. And some animosity, perhaps?

A. Well, I wouldn't say animosity. It was just a heated discussion.

Q. It was conducted in a perfectly friendly spirit, was it? A. That is right. [66]

Q. In other words——

A. (Interrupting): I always do.

Q. In other words, the words flew thick and fast but in an aura of peace, is that right?

A. That is right.

Trial Examiner: A friendly fight?

Mr. Weil: Let's trade punches?

The Witness: Yes, that is right.

Q. (By Mr. Smith): Were these issues more warmly discussed than other issues?

A. They were until Mr. Dufford said that he would; if any of the rest of them were paid a bonus, our people would be paid a bonus. He would treat them all alike.

Q. At what meeting did Mr. Dufford make that statement?

(Testimony of Frank T. Baldwin.)

A. I think in the morning meeting, and, also, it was stated at the afternoon meeting.

Q. On what day? A. July 23rd.

Q. Both times Mr. Dufford made that statement?

A. In the first meeting in the morning when it got a little warm—or heated, as you say—he then said that it was Company policy, that in the past history they had paid all people bonuses and he did not intend to change it. If anybody was paid a bonus, then they would all be paid a bonus. In the afternoon meeting it was decidedly heated, and then this episode took place that I [67] testified about this morning, and then during a recess the two boys and I went across the hall, and I asked them if they believed this.

Q. The two boys you referred to are whom?

A. Speed Stewart and Roy Buntin.

Q. Mr. Fortune or Mr. Dufford wasn't with you?

A. No, we had left them at the conference table. And I asked the boys if they believe this. And I don't remember which one I——

Q. If they believed what?

A. That they would be paid the bonus. I was trying to get the bonus and sick leave in the contract. The Union's policy is to get the things in black and white, and then you have no argument over them. The Company's attitude was that they wouldn't put them in there, and they further stated that they had been paying them heretofore so, therefore, nobody would get hurt—words to that effect on the thing. And I was insisting that they go in

(Testimony of Frank T. Baldwin.)

the contract because the negotiating contract, unless you have got it in there, it's my belief that it's not good. So I asked these two boys if they believed what he had said this morning, Mr. Dufford. And I am not sure which one, to my memory—my memory would lead me to say it was Roy, who had been there the longest, said "He has always paid a bonus. You can believe him. So it's O.K." And I asked the other boy, I am sure it was Speed, now, he was the newest employee, and he said "I have only been [68] here a short while, but you can believe him." And so I came back to the sick leave, and nothing further was said about it.

Q. Nothing was said?

A. Just about union shop and wages.

Q. No word was said about it until after the 1st of the year?

A. You mean asking the Company about it?

Q. Right.

A. No, we had had meetings in between.

Q. You had had meetings on bonuses in between those periods of times, is that correct?

A. No. He was working, the employees were working 47 hours, and they went to 40 hours. Some employees would come in at Monday noon, and we had asked Mr. Dufford to change that, and he had agreed that he would look into it and change it. And we had, if my memory serves me right, two meetings, talking on changing this, and finally there was a definite stand that we would change it the 1st of the year.

(Testimony of Frank T. Baldwin.)

Q. Change what?

A. This going to work at Monday noon instead of Monday morning at 8 o'clock. And in these two meetings, whatever date they were, I don't remember now, we had asked him about the bonus. The two employees were with me, Stewart and Buntin.

Q. What did Mr. Mr. Dufford say about bonuses?

A. They took the same position, it was a Company prerogative, and if they wanted to pay them, they would. And he was rather [69] irked about it, why we were interested in it. If the Company wanted to pay it, they would pay it, and that would be it.

Q. After you had entered into the contract on July 27, is that correct?

A. I think the contract was signed the 28th.

Trial Examiner: That was the period of the contract, 27th of July, 1953, to '54? The signing date doesn't appear.

The Witness: It was on that date, sir.

Trial Examiner: It's dated on the 27th there in the first paragraph.

Mr. Smith: Well, one day.

A. (Continuing): To further answer your question, we discussed bonuses after the 1st of the year, meaning 1954.

Q. (By Mr. Smith): You discussed bonuses specifically then?

A. Yes. At one time I asked——

Q. You mentioned them in these two previous

(Testimony of Frank T. Baldwin.)

meetings, at which Mr. Dufford took his original stand? A. That is right.

Q. Is that correct? A. That is right.

Q. Could you specify, within a relatively short period of time, when these two meetings took place?

A. No, I can't because it was a meeting over a condition in the contract, and it was just an everyday occurrence that happens, the Union going down and talking to the employer about [70] straightening up some grievance. I can't tell you the dates on that.

Q. You had a grievance at that time?

A. It was over the hourly week, the fellows coming to work, changing first from 47 hours to 40, and then the fellows coming in Monday noon rather than coming in in the morning; just a general discussion of what the Union terms a grievance.

Q. I see.

Trial Examiner: Do you know if that was this year?

The Witness: They were in 1953. I think we talked to him once in 1954, and he changed the setup, I believe, in March if I remember right, if my memory serves me right. We had prevailed upon Mr. Dufford to change it in January, and he was a busy man, of course, out of town a lot. And I think that he did change it in March. If my information is correct, I believe he did.

Trial Examiner: As a result of a recent discussion or was that just a belated action?

The Witness: Well, no. We had been talking

(Testimony of Frank T. Baldwin.)

to him about getting him to change it in previous meetings, and in one meeting in January, I believe it was, he then assured us that he would change it as soon as he could. And he did change it in March; I believe March was the date.

Trial Examiner: I think that fixes the date fairly well, doesn't it, of the discussion?

Mr. Smith: Well, one discussion was probably in the fall and one in January, is that correct? [71]

Trial Examiner: One was in 1953. I haven't tried to fix it any more there.

The Witness: Two.

Q. (By Mr. Smith): And the next one was in the spring of 1954?

A. That is right. And we then, the one in January, we then discussed bonuses again, and I asked him about paying them, and he still took the same position. And I said to him, "Well, in our negotiations you had said that if you gave anybody a bonus, you would give them all a bonus." And he seemed to be concerned how we found out who got paid a bonus and who didn't get paid a bonus.

Q. Mr. Baldwin, I believe you testified previously that you didn't have authority to enter into a binding bargaining agreement without first presenting that management's proposal to the membership. Did you present the management's proposal?

A. Yes.

Q. Of bonus?

(Testimony of Frank T. Baldwin.)

A. Yes, we discussed that in our meetings.

Q. What did you say at the meetings?

Trial Examiner: Can we fix the date or is this supposed to be general?

Mr. Smith: Well, yes, prior to the signing of the agreement on July 28.

A. That would have been between July 23rd and July 27th. I can't tell you what night without going back to the Union office. [72]

Q. What did you say?

A. I told the employees, who were all present except two, I believe, or one, that Mr. Dufford had assured us if anybody was paid a bonus—bonus and sick leave was the issue—that he had assured us that if anybody was paid a bonus, meaning in his employment, that they would all be paid bonuses. And the two boys who were setting in on negotiations with me, Stewart and Buntin, also said the same thing to the employees. And they finally accepted it by a majority vote, and I signed it.

Q. You are positive that Mr. Dufford made this statement? A. What statement?

Q. The statement to which you previously testified to the effect that if any employees were paid a bonus, all employees would be paid a bonus.

A. Yes, I am positive.

Q. You are positive that—do you know which employees specifically Mr. Dufford was referring to in such a statement?

A. Well, all employees. He said if a bonus was paid to any employee, they would be paid to all em-

(Testimony of Frank T. Baldwin.)

ployees within our unit and all the rest of the employees outside of our unit.

Q. Did he say within your unit?

A. He said all employees. There would be no change.

Q. Was he referring to all employees of the Company or all employees in the unit?

A. Both, all employees of the Company and all employees in the [73] unit.

Q. You said that you took Mr. Buntin and Mr. Stewart aside and asked them if that is what they had heard, you weren't quite sure of what you had heard?

Mr. Weil: That isn't what he said.

Q. (By Mr. Smith): What did you say? What did you state?

A. I asked them "Do you believe this?"

Q. "Do you believe this?"

A. Yes. Mr. Dufford had said if any employees would be paid a bonus and sick leave, all employees would be paid. That was the general conversation. And I asked the two, Stewart and Buntin, do you believe this? We went out and had a caucus and, to repeat myself again, I am almost positive that Mr. Buntin who had been there for years said, "Whatever he says, you can believe him, so it's all right." And the younger one, who would be Mr. Stewart, said, "Well, I haven't been there very long, but I know you can believe him." And so we went back to the meeting.

Q. In other words, Mr. Baldwin, you didn't feel

(Testimony of Frank T. Baldwin.)

that the issues of bonus and of sick leave were important enough to be written into the contract?

A. Yes, I was insisting they be in there.

Q. Did you insist they be incorporated in the written contract after Mr. Dufford had allegedly made his oral promise?

A. I insisted until such time as the two employees who sat in negotiations with me said, "As far as we are concerned, it's all [74] right." And I still took the position that they should be in there. However, with the general meeting we had with the employees, they voted to leave it out, and I signed it, leaving it out of the contract.

* * *

Q. (By Mr. Smith): Outside of the issues of bonus and sick leave, were all other issues which were negotiated at this time incorporated in the written contract?

A. I believe so. As near as I can remember, they were. [75]

* * *

Q. (By Mr. Smith): What was to be the amount of bonus paid?

A. We were asking in our proposal which had been previously made, if my information was correct, one month. Sick leave, we were asking for six days, I believe.

Q. Did the employer, did Mr. Dufford or Mr. Fortune, did anyone acting for the employer ever make the statement that they would pay you one

(Testimony of Frank T. Baldwin.)

month's bonus? A. No.

Q. Or six days' sick leave? A. No.

Q. You had an agreement, a rather hazy, vague agreement, a promise on their part, which you understood to be a promise, that if they paid bonuses to anybody, they would pay bonuses to your people. What kind of a promise is that? That isn't a promise to pay a certain number of days' bonus.

A. I had their word, and in my business an employer's word means a lot to me. I had his word, Mr. Dufford's word, and I had [77] Mr. Fortune's word that they would not take it away from them. They would pay them the same bonus and the sick leave that had heretofore been paid. That is why I believed them.

* * *

Trial Examiner: Was there any reason why you didn't ask them to put the promise in writing that if they gave any bonus or sick leave they would give it to all?

The Witness: Well, we were trying to get that in our contract; in our proposal, we had that in there.

Trial Examiner: I know. Your proposal was for a definite bonus and a definite sick leave?

The Witness: That is right.

Trial Examiner: I am asking you whether or not you requested an indefinite assurance in the written contract that if any bonus or sick leave was given to any employee, it would be given to all?

(Testimony of Frank T. Baldwin.)

The Witness: No. We just took them for their word, at their word.

Q. (By Mr. Smith): Mr. Baldwin, if you took their word on that, how come you didn't take their word on all the other items which were included in the written contract? How come there is a written contract? [78]

A. There never will be any more words taken for granted, I will answer that way.

Trial Examiner: That is not responsive.

A. Strike that. Because that is what we finally arrived at and signed.

Q. (By Mr. Smith): Can you make a responsive answer to that question?

Mr. Weil: Let me object to the question as immaterial and irrelevant.

Trial Examiner: I think I will overrule that.

> (The question was read as follows: "Q. Mr. Baldwin, if you took their word on that, how come you didn't take their word on all the other items which were included in the written contract? How come there is a written contract?")

A. The reason for a written contract is because that is what the employees agreed to and voted and authorized me to accept, and that was signed.

Q. And no other contract?

A. No other contract.

Trial Examiner: I made a statement awhile back in which I used the word "indefinite." I should

(Testimony of Frank T. Baldwin.)

have used the word "conditional." In other words, in my question to the witness as to whether or not not he asked that the written contract include an indefinite promise, I should have said a "conditional promise," [79] that if a bonus or sick leave were given to one, it would be given to all.

You understood my question in that form, I take it?

The Witness: Yes, sir.

Q. (By Mr. Smith): I believe, Mr. Baldwin, you mentioned in your direct examination on the subject of sick leave that it has been your experience that only 65 per cent of the employees use sick leave. Is that correct?

A. I was using one Co-op Creamery as an example.

Q. How many employees?

A. I think he has around 70 or 80.

Q. And by that statement, you mean 65 per cent of the employees used all of their sick leave?

A. Yes.

Q. And the other 35 per cent, then would use—— A. None. [80]

* * *

(Testimony of Frank T. Baldwin.)

Redirect Examination

By Mr. Nielson:

Q. Mr. Baldwin, going back to this meeting, your testimony on this meeting wherein the oral contract was discussed, do you recall having any conversation with Mr. Fortune and Mr. Dufford in reference to the system that Intermountain Equipment Company had had prior to this time in reference to sick leave and bonuses?

Trial Examiner: Are you referring to all meetings or any specific one?

Mr. Nielson: All meetings. [81]

* * *

Mr. Smith: Can we hear the question restated?

(Question read.)

A. There was no discussion on the system if my memory serves me right. We were just asking that they be paid the same, on the same bonus system that they had been using and sick leave.

Q. (By Mr. Nielson): Was there any, did they tell you then what the prior system had been at Intermountain Equipment Company?

A. That employer, you mean?

Q. No.

Trial Examiner: Did you know?

The Witness: Through the employees, yes, sir. [83]

* * *

(Testimony of Frank T. Baldwin.)

Q. (By Mr. Nielson): * * * Was there any reason why there wasn't a written contract covering this oral contract on sick leave and bonus?

A. In the first place, the Company objected to putting it in the contract, and secondly, the employees had said, "Well, whatever he says, he will do, and that is all right," and that is the reason it wasn't put in there.

Trial Examiner: Just a minute. It seems to me that the witness must have misunderstood the question in order to answer it that way. In view of the witness' previous testimony that he did not request that the conditional promise be put in the contract, I think that his answer was intended to be, to refer to the objection of the respondent to the specific bonus of one month's pay and six days' sick leave rather than the conditional promise.

Now, I don't know whether your question was intended to go only to the conditional promise or not, Mr. Nielson.

Q. (By Mr. Nielson): Perhaps I am confused. There was no written clause put in the contract as requested by the Union, is that correct?

A. That is right.

Q. On this oral statement and promise made by the Company, that wasn't reduced to writing, is that correct? A. No.

Q. Is there any reason why it wasn't reduced to writing?

A. The Company objected to reducing it to writing. [84]

(Testimony of Frank T. Baldwin.)

Q. Was that the only reason?

A. The other reason being that the employees in this caucus said that whatever he tells you, you can believe him.

Trial Examiner: Mr. Baldwin, when I was questioning you awhile back, you said that you never asked the Company to put that specific promise in writing. Therefore, how could there be an objection?

The Witness: In our proposal, we had had it in our proposal to the Company, I mean the proposal we gave the Company, it was in there.

Trial Examiner: The proposal, however, was not that the Company pay bonuses to all employees if any got it?

The Witness: That is right. So we didn't put it in the contract that the Company objected to—wouldn't agree, as a matter of fact, to put it in the contract. And the only reason I personally agreed to it was because of the fact that the employees said it was all right, leaving it out of the contract.

Trial Examiner: Any further questions?

Q. (By Mr. Nielson): Was there any discussion had in reference to adding that specific clause or that specific type of an agreement to the written contract?

A. There was discussion in the regular meeting with the balance of the employees, yes.

Trial Examiner: Which particular phase?

Mr. Nielson: In reference to sick leave and bonus. [85]

(Testimony of Frank T. Baldwin.)

Trial Examiner: As originally proposed?

Mr. Nielson: No, as stated by the Company.

The Witness: It was discussed in the general meeting except it wasn't in the contract.

Q. (By Mr. Nielson): As a proposal by the Company? A. Yes.

* * *

Recross-Examination

By Mr. Smith:

Q. What specific statement did Mr. Dufford make relative to sick leave?

A. He said that all employees would be treated alike. If he gave it to the employees, any of the employees, he would give it to all the employees.

Q. And Mr. Dufford never told you his policy toward sick leave? [86]

A. We may have discussed that some. I don't think to a great extent because I didn't know how much sick leave—we were asking for, specifically, six days' sick leave. I think it was discussed, I don't know which meeting, that they had different policies on that. We didn't go into that, no.

Q. Then it was your understanding that Mr. Dufford agreed to six days' sick leave?

A. No.

Q. What is the oral contract?

A. That he would not change it. Just the same as before the Union went in there, whatever sick leave they were getting before, the employees would still receive that. It would not be denied them.

(Testimony of Frank T. Baldwin.)

Trial Examiner: But they were not receiving any?

The Witness: Well, sir, my information was that they were.

Trial Examiner: That they had been in the past?

The Witness: Previous to the Union, yes.

* * *

Q. (By Mr. Smith): In your experience in dealing with a good many employers and in bargaining on behalf of the Union, has it been your experience, is it customary in your opinion for you or for others that oral agreements should be a part of agreements with employers or that you have side oral agreements with employers? [87]

A. Employers I deal with, their word is as good as a contract, many of them.

* * *

Trial Examiner: Where did you get your information as to the practice of the Company in regard to sick leave before the [88] Union was certified?

The Witness: In the Union meetings that we held before we were certified.

Trial Examiner: That is to say, employees told you what the practice had been?

The Witness: They told me approximately the past practices, yes, sir, that the bonus, they got one month's salary, I believe, and in sick leave, they were allowed two or three days or four days or a week or whatever time they were sick. I remember

(Testimony of Frank T. Baldwin.)

in one case one employee was allowed more than that.

Trial Examiner: Were they telling you what the practice was or what their personal experience had been?

The Witness: They were telling me what the past practice of the Company had been.

Trial Examiner: That is to say that all the employees in the unit had gotten one month's pay?

The Witness: I think that is right.

Trial Examiner: For how many years?

The Witness: I can't answer that. I think some had been there five years, some three years. I think if an employee had been there, I believe, less than a year—I am not positive on this—he didn't receive any bonus or he may have received a portion of a bonus; but after they are there a year, I think they all receive—at least I was told—an amount of pay equal to a month's pay, that amount of bonus. [89]

Trial Examiner: Was there any statement as to how long that had been in effect?

The Witness: I believe one employee said seven years.

Trial Examiner: Was that brought up in your meeting, or any of your meetings, with Mr. Dufford?

The Witness: The amount of time?

Trial Examiner: Yes, other than the past practice.

The Witness: No, other than we wanted the same as they had been getting.

(Testimony of Frank T. Baldwin.)

Trial Examiner: Did you verify with Mr. Dufford what the past practice had been?

The Witness: I don't think we discussed that thoroughly because sick leave, as I said, depended on one day or two days or three days or whatever it happened to be.

Trial Examiner: Let's just talk about bonus for a minute.

The Witness: I don't believe I did, no.

Trial Examiner: I believe you said that Mr. Dufford took the position that the bonus was the Company's prerogative?

The Witness: That is right.

Trial Examiner: Whether they would give it or not?

The Witness: That is right.

Trial Examiner: In any of your discussions with employees or otherwise, did you get any information as to what the practice of the Company had been with respect to giving bonuses or sick leave to employees not in the unit? [90]

The Witness: No, only hearsay is all, sir.

Trial Examiner: I am going to ask, and counsel may object if they wish to this question, but I would like to ask because I feel that the witness' understanding may have some bearing upon the question of a meeting of the minds.

What was your information or belief as to employees outside of the unit, that is, with respect to the respondent's practice of giving sick leaves or paying bonuses?

(Testimony of Frank T. Baldwin.)

The Witness: Well, if my information is correct, they were paid the bonus this last year.

Trial Examiner: No, I am talking about the practice. You have said that with respect to the employees in the unit that you talked to, they represented to you or gave you the idea that it had gone on for seven years, with respect to bonus. Now I am asking you, did you have any information or belief with respect to the practice of employees not in the unit?

The Witness: No. No.

Trial Examiner: You didn't know anything about what bonuses they may have gotten?

The Witness: No.

Trial Examiner: Would the same be true with respect to sick leave?

The Witness: Yes, sir.

Trial Examiner: Would it be correct to say that any discussions you had with Mr. Dufford concerning bonuses or sick [91] leave were confined to the employees in the unit?

The Witness: Yes.

* * *

(Testimony of Frank T. Baldwin.)

Redirect Examination
(Continued)

By Mr. Weil:

Q. Mr. Baldwin, during the negotiations, was there at any time a discussion in which Mr. Fortune and Mr. Dufford participated concerning the practice of the Company in the past in paying sick leave and bonuses?

A. They had said that they had paid them to all employees.

Q. Is that all? A. Except——

Q. Do you recall the statement that Mr. Dufford made, if any, or——

A. No, not necessarily. Mr. Dufford took the position that that was a Company prerogative and he couldn't, he wanted to know how the Union found out who was getting bonuses and so on and so forth, how we knew, how the Union knew that.

Q. My question was, was there a discussion during which Mr. Dufford told you what the past practice of the Company had been?

A. The amount of pay?

Q. Not the amount of pay.

A. No, that they had been paying bonuses.

Q. The practice they had? [92]

A. And that he would not change that system.

Q. Did he say they were paying bonuses to all or just to some?

A. I don't think I remember it word for word, but he said, "To the employees."

(Testimony of Frank T. Baldwin.)

Q. Do you recall whether there was any discussion and comparison of the system of paying bonuses in force at, or that had been used at Intermountain and that that had been used at M.K.?

A. Well, the discussion was that Mr. Fortune then said that the monthly employees got paid a bonus, but the hourly employees did not get paid a bonus. And I remember talking of bonus with some other employers we had had under contract. They were paying 5 per cent of the contract at the end of the year.

Q. But did he state on what basis they were paying? A. No.

Trial Examiner: Did anybody say anything about the comparison of the two companies as to the basis for pay?

The Witness: No. They were just discussing it, Mr. Fortune being from M.K. and Mr. Dufford being from Intermountain. They were discussing their system of paying bonuses, and Mr. Dufford's system of paying bonuses. I didn't ask him because I knew what the employees had been getting as far as bonuses were concerned, which was equivalent of one month's pay.

Trial Examiner: This was just a side conversation, then, between Mr. Fortune and Mr. Dufford?

The Witness: Well, no. Mr. Fortune told myself and the [93] two employees how M.K. paid the thing.

(Testimony of Frank T. Baldwin.)

Recross-Examination
(Continued)

By Mr. Smith:

Q. As a matter of fact, Mr. Baldwin, in the negotiations, the statement to which you referred in the promise on the part of Mr. Dufford, was it substantially this statement: that he considered bonuses a management prerogative, and that he would continue in the future to treat bonuses as a management prerogative, and he wouldn't change that system?

A. I distinctly said that he would not change it, and he added that if any employees would be paid bonuses, all employees would be paid bonuses.

* * *

Mr. Weil: I would like to call Mr. Dufford under Rule 43(b), please.

PHILIP A. DUFFORD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: Will you state your full name, please?

The Witness: Philip A. Dufford.

Trial Examiner: And your home address? [94]

The Witness: 1921 North Twenty-first Street, Boise, Idaho. [95]

* * *

(Testimony of Philip A. Dufford.)

Q. (By Mr. Weil): Mr. Dufford, by whom are you employed?

A. Intermountain Equipment Company.

Q. Are you an officer of the Company?

A. Yes.

Q. What office do you hold?

A. Vice-president and general manager.

Q. As general manager, what are your duties?

A. To direct the affairs of the Company.

Q. All the affairs of the Company?

A. I have a hand in all of them. [99]

* * *

Q. (By Mr. Weil): Where is your office, Mr. Dufford?

A. Our principal office or head office is Boise, Idaho.

Q. No, your own office. Is your office in your principal office in Boise? A. Yes.

Q. How long have you occupied your present position with the Company?

A. That one, it would take a little time to answer. I have been vice-president and a corporate officer for approximately 13 years. I have been general manager of the Company, I believe, since about 1944. I can check that record and give you an accurate answer, but I can't tell you exactly.

Q. That is a close enough approximation.

Prior to becoming general manager of the Company, did you have another managerial position with the Company?

(Testimony of Philip A. Dufford.)

A. Yes. I was general sales manager.

Q. As general manager of the Company, are you responsible for the Company's policies in matters of labor relations? A. Yes.

Q. Are you responsible both to administer those policies and to arrive at those policies?

A. A portion of my responsibility would be shared by our board of directors.

Q. As to arriving at the policy, I take it? Does the board [100] of directors also participate in administering them?

A. Primarily that is my responsibility.

Q. As the person primarily responsible for the administration or labor relations policies, do you know how many employees you have approximately at the present time?

A. Yes. I could count if you don't mind.

Q. Do you have a record or something like that here?

A. Approximately 57 at Boise. Please understand we are confining this to this location.

Q. With that question, yes. I assume your managerial capacity extends to other locations?

The Witness: For the purpose of this discussion, we are talking about Boise only, are we not?

Trial Examiner: That is right.

Mr. Weil: That is right.

A. The reason I am uncertain, we have some turnover of employees in our accounting department and our purchasing department and other departments, which makes that figure change from

(Testimony of Philip A. Dufford.)

time to time, depending on the work load and availability of employees. It has been as high as 90, and it has been as low as maybe 20 at one time, going back many years. At the present time, it would be somewhere between 55 and 65.

Q. (By Mr. Weil): Does that extend for the last year, since the Union organization started, that it would be between those figures? [101]

A. It could have been greater at the earlier part of that.

Q. There may have been some diminishment in that number since last year?

A. Yes, due to business conditions.

* * *

Q. (By Mr. Weil): During your term as general manager, has the Company given Christmas bonuses to any of its employees?

A. We have paid bonuses to some employees.

Q. In the year 1952, were Christmas bonuses paid to employees?

A. We paid bonuses to some employees for '52 work.

Q. On what basis did you select those employees who were paid bonuses that year?

A. Strictly upon the judgment of the management and our own ideas on the subject.

Q. Well, inasmuch as you represent management, I assume you were aware of the judgment of management. On what basis was the [102] judgments of management exercised?

* * *

(Testimony of Philip A. Dufford.)

Q. (By Mr. Weil): I don't believe anybody said that. However, I assume you are aware of what factors were considered? A. Certainly.

Q. And this is the question.

A. The attitude of the employees, length of service with the Company, their relation to productive effort, degree of their participation in the objectives of our Company, which is to try to sell goods at a profit, the dispatch of their duties as assigned to them and as directed by their supervisors. Possibly other factors which I believe would be of confidential nature, involving personalities. [103]

Q. Did the consideration of these factors cause you to grant or withhold a bonus or cause you to grant a smaller or larger bonus? A. Both.

* * *

Trial Examiner: The question and answer will stand. The witness wanted to hear the question again, I believe. Will you read it?

(Question read.)

Trial Examiner: Having heard the question asked again, do you want to reverse your answer? [104]

The Witness: Counsel is asking me specific questions about something that is not specific in the way that we handle our bonus plan.

Q. (By Mr. Weil): That is what I was going to ask you.

A. We operate under what might be termed a manager plan of bonuses whenever, when and if

(Testimony of Philip A. Dufford.)

they are paid. To try to make specific formula or system out of that is not possible for me.

Q. That was the question, whether a specific formula was applied that——

A. (Interrupting): I didn't hear the question that way.

Q. I will restate it, then. Was there a formula applied by which bonuses varied not only in that they were granted or not granted, but in the amount granted? A. No formula was applied.

Q. Was in 1952 a specific amount of bonus granted, based on the same considerations for each employee who received a bonus?

* * *

Trial Examiner: Let me see if I do.

Are you trying to ask, Mr. Weil, whether all employees who [105] got bonuses at that time got the same amount?

Mr. Weil: Not the same amount, but the amount varied according to the same standards. In other words, did they get, each of them, a month's basic pay or did some of them get eight months', did some of them get one dollar? That is what I am trying to bring out.

The Witness: There was no consistent pattern involved.

Q. (By Mr. Weil): As to the employees who are presently within the unit, did any of those employees receive a bonus in 1952?

A. I believe so.

(Testimony of Philip A. Dufford.)

Q. Did any of those employees who were employed in 1952 by the Company not receive a bonus?

A. That I don't know right now. I would have to consult my record on that.

Q. Do you have that record with you?

A. No, I don't.

Q. Are you able to tell me percentagewise how many, what the percentage of the, of your employees in 1952 received a bonus? A. No.

Q. Could you answer that question by consulting your records?

A. Certainly, if it's pertinent to this hearing. [106]

* * *

Q. (By Mr. Weil): Do you recall whether any of your regular employees who had been with you during the year 1952 failed to receive a bonus for that year?

Trial Examiner: By regular employees, you mean those——

Mr. Weil: Who had been there for the period of that year.

A. I cannot tell you until I look into it.

Q. Do you recall how many of your employees received a bonus in 1952, at the end of 1952?

A. No, sir.

Q. And I assume you don't recall how many employees you had at the end of 1952, is that correct?

A. That is correct. [107]

* * *

Mr. Weil: Yes, sir. After considerable discussion, counsel indicated that he would stipulate in the following terms——

Mr. Smith: May I see the stipulation before you read it?

Mr. Weil: Yes.

Mr. Smith: Very well.

Mr. Weil: During the past several years, substantially all the employees, as defined in the Act, including substantially all employees whose classifications are presently in the bargaining unit, were paid annual bonuses.

* * *

Trial Examiner: On the record. [112]

Did the other counsel state that they entered into that stipulation, Mr. Smith?

Mr. Smith: No, they haven't.

Mr. Nielson: We will so stipulate.

Trial Examiner: And Mr. Smith?

Mr. Smith: We so stipulate.

Trial Examiner: And of course Mr. Weil does, since he offered it?

Mr. Weil: Yes.

PHILIP A. DUFFORD

a witness called by and on behalf of the General Counsel, having been previously sworn, was examined and testified further as follows:

Direct Examination
(Continuing)

Trial Examiner: You are just continuing the examination you began yesterday when you called Mr. Dufford under Rule 43(b)?

Mr. Weil: Under Rule 43(b), yes, sir.

By Mr. Weil:

Q. What is the company's practice on the payment of sick leave to its employees in the unit at the present time?

A. We, at the present time, have a clause in our 1954 contract which specifies that we will keep a record of sick leave and will pay sick leave up to six days per year.

Q. What was the company's practice during the year July 27, 1953, to July 27, 1954, concerning payment of sick leave to employees [113] in the unit?

A. We had no sick leave clause in our contract and therefore we had no record which would indicate payment for absences.

Q. Was sick leave paid to any of the employees in the unit during that time? A. No.

Q. Prior to July 27, 1953, what was the practice of the company as to payment of sick leave to employees who later became those employees in the unit?

(Testimony of Philip A. Dufford.)

A. We had no policy or practice governing that particular thing.

Q. When an employee was sick, was he paid sick leave?

A. Not as such. That could vary. There was no set policy in that regard.

Q. Were any employees docked for time they lost because of sickness prior to that time?

A. I suppose they were. I don't believe that we had any—well, we had no way of determining that. In fact, we had no record which would disclose whether a person was absent because he was sick or for some other reason.

Q. An employee who informed his supervisor that he was sick and took off, thereby informing the company that he was ill, would that employee have been paid sick leave?

A. In our operation that was pretty much up to to the supervisor.

Q. Were there any ground rules under which supervisors made [114] decisions as to whether sick leave was to be paid or not?

A. Not that I know of.

Q. It was strictly a matter of the supervisor's own feelings on the matter?

A. Generally speaking, yes. It was possible he might consult with someone in the management group, I mean if there was protracted absenteeism involved.

Q. What led you to deny sick leave to your employees in the unit after the signing of the contract?

(Testimony of Philip A. Dufford.)

A. There was no sick leave provision in the contract.

Q. Were the rules of the company changed in any respect as to the employees in the unit, as to sick leave? A. I——

Trial Examiner (Interrupting): Will you read that question again, please?

(Question read.)

Q. (By Mr. Weil): Perhaps I should add, after the signing of the contract in 1953?

A. Well, I don't see how we could change any rules when we had no set rules.

Q. It is true, is it not, that after the signing of the contract no employees in the unit were paid sick leave? Isn't that so?

A. It wasn't covered by the contract.

Q. That isn't the question. [115]

The Witness: Will you read the question?

(Question read.)

A. Yes.

Q. (By Mr. Weil): It is true that prior to the signing of the contract employees at least may have been paid sick leave, is that not so? A. No.

Q. Are you saying that prior to the signing of that contract no employee was paid for sick leave?

A. I am saying that we had no policy in that regard and that if a person were paid for a time when he was absent, I don't have the slightest idea whether it was for sick leave or not.

(Testimony of Philip A. Dufford.)

Q. So persons may have been paid sick leave?

A. They may have been paid while they were absent from duty.

Q. So that there was a change in the company practice, then, after the signing of the contract?

A. No. After the signing of the contract we adhered strictly to the terms of the contract with respect to those members of the bargaining unit.

Trial Examiner: May I ask a question?

You said that previously it had been left pretty much up to the supervisor as to what to do if an employee had reported in that he was ill and was absent because of that. Now, were the supervisors given any instructions that they no longer had the authority to grant pay during absences, after the signing [116] of the contract?

The Witness: The instructions given to the supervisors in the unit were that they should at all times follow the letter of the contract.

Trial Examiner: Of course, the contract didn't say that sick leave should not be paid?

The Witness: It didn't have any clause regarding sick leave whatsoever.

Trial Examiner: Did you tell the supervisors that they should do nothing except what was in the contract?

The Witness: Right.

Trial Examiner: I am through. Thank you.

Q. (By Mr. Weil): Mr. Dufford, was the basis upon which the employees who are presently in the

(Testimony of Philip A. Dufford.)

unit were paid prior to the election the same as that by which they are paid now, after the election?

Trial Examiner: Do you understand the question?

The Witness: No, I don't understand what is meant by that.

Mr. Weil: I will break it down into two questions.

Q. (By Mr. Weil): Are the employees in the unit now paid on an hourly basis? A. Yes.

Q. How were they paid prior to the election?

A. Most of them, if not all, were paid on an hourly basis prior to the election. You are talking about the members in the [117] unit?

Q. Yes. A. Employees, I mean.

Q. Most of them were paid on an hourly basis. Did they have time clocks prior to the election?

A. We did not have time clocks prior to the election.

Q. Did you install time clocks any time since?

A. We did install a time clock after the election.

Q. For whom?

A. For the protection, the benefit of the members of the unit and management, to be certain, and that we had to maintain an accurate record, which was not deemed necessary before.

Q. Most individuals in the unit were hourly-paid, you say, before the election?

A. Yes, sir.

Q. Was it more necessary to install a time clock for their protection after the election than before?

(Testimony of Philip A. Dufford.)

A. Yes.

Q. In what respect?

A. In that we were not bound by the terms of a union contract which prescribed hours and time of employment and made it necessary for us to have such a record. We were satisfied with our own loose-knit way of doing business prior to that.

Trial Examiner: Was there any provision for time and a half before the election? [118]

The Witness: We paid time and a half.

Q. (By Mr. Weil): How long after the election were the time clocks installed?

A. I can't tell you the exact day. As soon after the election as we could install it. [119]

* * *

Q. (By Mr. Weil): You instructed all of the employees to punch the time clock? A. No.

Q. The time clock was only for the employees in the unit, then, is that correct? A. Correct.

Q. When employees are sick, they fall sick during working hours, or are required to meet a doctor's appointment or something like that, are they instructed to punch the time clock, punch out on the time clock?

A. They are instructed to punch out on the time clock whenever they leave, for any cause.

Q. And when they return, they punch in again, I assume?

A. That is right. A time clock operates, our time clock operates the same as any other time

(Testimony of Philip A. Dufford.)

clock in any other industry, as far as I know. Time clocks are time clocks.

Q. So that there is a record on the time clock of every absence, whatever the purpose of that absence, is that correct?

A. There should be. I assume that there is.

Q. There is if the employees have followed your instructions, the instructions they received?

A. Yes.

Q. Is there any notation made on the time cards as to their reasons for absences, when persons punch out? [120]

A. To the best of my knowledge, there wasn't prior to the inclusion of a sick leave clause in our 1954 contract.

Q. What is the company's policy toward absenteeism?

A. We have no set policy regarding absenteeism.

Q. Does the company take cognizance of absenteeism among its employees in the unit?

A. We do at present, since we have a sick leave clause incorporated in our 1954-55 contract.

Q. Did the company take cognizance of absenteeism prior to the signing of the '54 contract?

A. For that period are you indicating, the '53-'54 contract?

Q. That is right.

A. Only in that the records would disclose the amount of time off for any reason.

Q. Was any disciplinary action taken against any employee for excess absenteeism during that

(Testimony of Philip A. Dufford.)

year? A. Not that I know of.

Q. Were any employees absent for an excessive amount of time, to your knowledge, during the '53-'54 contract? A. Not to my knowledge.

* * *

Q. (By Mr. Nielson): Perhaps for purposes of clarity, talking [121] about the certified unit and other units in your plant, would you describe your plant layout and your divisions of employees or work processes, for claritive purposes?

* * *

A. We are a distributor of construction equipment. Our business is a variable one. We are not in what you might call a commodity business. We are in the sale of specialized equipment used by the construction, logging, mining and industrial trade. As to our organizational setup, we have an administrative or executive group and then the rest of our operation is, well, it would probably be called departmentalized——

Q. (By Mr. Nielson): Would you name the departments?

A. Yes. We have a purchasing department—one thing I would like to add here is that in our organization it is entirely possible, with all the departments I am speaking of, to have [122] functions overlapping, because we——

Q. (Interrupting): That is true in any of them——

(Testimony of Philip A. Dufford.)

A. (Interrupting): We are a small organization.

Q. I was just trying to get a definition.

A. Excuse me.

Q. I was just trying to get an over-all picture.

A. We have a purchasing department, an accounting department, a parts department—which, generally speaking, is the department within which this unit exists—a shop, a punch department, and a sales department.

The Witness: That is as well as I can explain it, Mr. Hemingway.

Mr. Nielson: That is sufficient.

Q. (By Mr. Nielson): Now, of all these units we have been talking about here, the only people, employees of the company, who are the members of the Union are the parts department, is that right?

A. They are the only ones who have petitioned for a Union.

Q. They are the only ones who belong to a Union?

A. The only ones for whom a Union has representation, exists, are employees in the parts department, up until that time.

Q. You have testified in reference to your records, lack of records, prior to the election in 1953 on sick leave. Now, how did you keep your time cards for your employees prior to that time? Who made them up, in other words? [123]

A. That is a detail that was handled by the supervisor of the department. We used a time-card

(Testimony of Philip A. Dufford.)

system, just filling it out at the end of the day. I would have to consult with the supervisor to find exactly—that is a detail that I didn't consider anything that I had to familiarize myself with a hundred per cent. I can't tell you exactly.

Q. Do you know whether or not the individual employee filled out the time card or whether the supervisor did?

A. I don't know that. I am sorry. I can find out very readily. In fact, if you wish, we could ask one of the boys here.

Q. Let me ask you this. At the end of the week, or payroll period, then those time cards were the basis on which the employees were paid, were they not?

A. So far as I know, yes. I didn't make out the payrolls or anything of the kind, because that is the function of some other department, and I have not familiarized myself with all those details.

Q. Now, in the other department, other than the parts department, the unit here involved, do you know how they make out their payroll, time cards, at the present time?

A. Those people generally are paid on a monthly salary basis.

Q. All of them other than these people in the unit are on a monthly salary?

A. That is right.

Q. Now, prior to the time of the election, were not all the [124] people paid on a monthly-salary basis once a month rather than on an hourly basis?

(Testimony of Philip A. Dufford.)

A. The members of our parts department, because of the nature of the work, were paid on an hourly basis.

Q. And they are the only people in your entire operation that are paid on an hourly basis?

A. Well, there is only one qualification I would like to make in that, that is regarding our shop and service employees, who operate under the Belo Plan, with which I am sure you are familiar.

Q. How about the people in the punch department? Are they hourly or monthly?

A. To the best of my knowledge, they are monthly. Some of the details on these things, Mr. Nielson, are things, I am sorry to say, I undoubtedly sound a little dumb to you, but I have not gone into the details except in a general way of knowing, we have the employees in those departments, but I don't make out the payroll and I don't handle all that detail.

Q. Well, the reason for my questioning was this, I am trying to find out if there was any comparison or any records that would be available for comparison to ascertain whether sick leave had been paid or not—so as far as you know, according to the way the time cards are made out, you would have no knowledge as to whether or not sick leave was paid on any sort of a basis? That was entirely up to the supervisor? [125]

A. Yes. Our records would not disclose that information.

(Testimony of Philip A. Dufford.)

Q. It would be strictly up to the supervisors, then?

A. It would, unless it were called to the attention of management in some way.

Q. But as far as you know, it hasn't been called to your attention? A. No.

Q. Following the election, you installed the time clock for these employees only? A. Yes.

* * *

Q. (By Mr. Nielson): Then, for the other people not members of the unit, their supervisor keeps their own time cards?

A. The head of each department is assumed by us to be in nominal charge of the people under his direction.

Q. I see. Now, following the election and certification of the unit, you gave specific instructions to the supervisors in that unit to follow the wording in that contract exclusively, is that correct?

A. Yes, sir.

Q. Now, at the present time are the time-clock cards in the custody of the supervisor of the department? [126]

A. Well, I believe they are.

Q. And then they are turned in to the payroll department?

A. Turned over to the payroll department for transferral of payroll records.

Trial Examiner: There is just one supervisor of

(Testimony of Philip A. Dufford.)

the department? I suppose that means the head of the department?

The Witness: Yes.

Trial Examiner: What is the title of the head of the department?

The Witness: Well, as far as he is concerned, he maintains the same designated before, we maintain the same designation for him, we call him the manager of our parts department.

Trial Examiner: All right.

Q. (By Mr. Nielson): Now, the managers of the various departments and the supervisors of the various departments, do they have to O.K. the payroll check or have anything to do with the amount of time that employees are paid upon?

A. In what way do you mean that, Mr. Nielson? As applying to all employees?

Q. Applying to all employees, yes.

A. Why, I suppose there is an understood approval of it, at least they would be paid at the rate set up for them unless their supervisor wished to change it in any way. Ordinarily there would be no necessity for change probably.

Q. Now, I think you testified that you had no set practice on [127] sick leave prior to '53, is that correct? A. Yes, sir.

Q. In other words, there was no set standard by the company as to what would be allowed and what would not be allowed, is that right?

A. That is right.

Q. But had it been the practice to allow people

(Testimony of Philip A. Dufford.)

to be off sick and still draw their pay for that time off, to your knowledge?

A. It was not set up that way by any company policy. We——

Q. (Interrupting): Well, was it done, to your knowledge?

A. We may have done it in some cases, I am sure we have.

Mr. Nielson: That is all I have.

Trial Examiner: Do you want to ask any questions at this time, Mr. Smith?

Mr. Smith: Yes, I believe so. I would like to ask as to a few points.

Cross-Examination

By Mr. Smith:

Q. You testified now that you had no set policy as to sick leave prior to 1953?

Trial Examiner: It was '54, wasn't it?

Mr. Smith: Well, the question was as to '53.

Trial Examiner: Oh, I see. The first contract, you mean.

Q. (By Mr. Smith): Or, as a matter of fact, prior to 1954, isn't that correct?

A. Yes. [128]

Q. You do have a sick leave policy as to the employees in the bargaining unit since the 1954-55 contract has been negotiated, is that right?

A. It's contained in the 1954-55 contract, the provision for sick leave.

(Testimony of Philip A. Dufford.)

Q. Under that provision, you are obligated to pay how many days sick leave?

A. Up to six days.

Q. Up to six days.

A. And I would like to ask you to consult the contract for the exact wording of that. There are so many days in one month, a total of six days a year. I could ask someone to read that clause of the contract.

Trial Examiner: It's in evidence already.

Mr. Weil: That contract is not, sir.

Mr. Smith: I wanted Mr. Dufford's answer at this time. We will get to that later.

Q. (By Mr. Smith): Just in clarification of several points, are you obligated to pay any other employees, that is, employees other than those in the bargaining unit, sick leave at this time?

A. We are not obligated in any way to pay them sick leave, other than those in the unit, wherein the clause stiplates that we must pay them sick leave. No one outside the unit has any such assurance.

Q. And outside the unit, I believe you testified that all [129] other employees are paid on, or substantially all other employees, outside the unit, are paid on a wage or salary basis, is that correct?

A. Right.

Q. And no time cards are kept on those people?

A. Right.

Q. And never have been? A. Right.

Q. As to the unit in question, then, no sick leave provisions applied to the people who are pres-

(Testimony of Philip A. Dufford.)

ently in this unit until the 1954-55 contract was negotiated, at which time you became obligated to pay up to six days sick leave time, is that correct?

A. Right. [130]

* * *

Trial Examiner: Was there any particular reason why you sought the assistance of Mr. Fortune?

The Witness: Yes.

Trial Examiner: What was that?

The Witness: I felt that I was completely green and [131] ungrounded in matters of Union practice, and Mr. Fortune's business was the handling of labor-management problems, and I felt that he would know more about it, certainly, than I did, and I sought his advice in an effort to acquaint myself with a subject unknown to me.

Trial Examiner: Was there any connection between you and, or your company, Morrison-Knudsen, other than that of distributor and customer?

The Witness: I don't know if that has a bearing on this case.

Mr. Smith: I question the materiality of it, although I recognize the right of the Examiner to ask leading questions or to draw a conclusion where a conclusion might be drawn. Certainly there has been no allegation that Intermountain Equipment Company and Morrison-Knudsen Company have any relationship and I don't know whether it's material or not, and I don't believe it should be in the record. I might say, by way of explanation, Mr. Fortune's services were utilized by a good number

(Testimony of Philip A. Dufford.)

of firms, some of which had connection with Morrison-Knudsen, others which did not have connection with Morrison-Knudsen.

Trial Examiner: I was just wondering whether or not—well, I will sustain the objection to the question I asked, but I am going to ask another one.

Was it at Mr. Fortune's suggestion or yours that he was present at the first negotiating [132] meeting?

The Witness: It was at my suggestion. May I add something?

Trial Examiner: Go ahead.

The Witness: My chief reasons for consulting with Mr. Fortune were the reasons I gave you, and my reason for selecting him rather than some other person in the management-labor field, the fact that I happen to know him, the fact that he was more readily available for consultation than anyone else, it would be more natural for me to consult him.

Trial Examiner: In connection with the testimony you gave to Mr. Weil, on examination by Mr. Weil, in connection with the installation of the time clock, I think you said you put it in as soon as possible after the election—just to make it perfectly clear on that, do you mean even before the certification?

The Witness: I don't mean that. I mean as soon after the certification as possible. My terminology may not fit, so you will have to call my attention to that when it's necessary.

(Testimony of Philip A. Dufford.)

Trial Examiner: See if I understood you correctly—you said that the reason for installing the time clock was because of the fact that you anticipated that you would be held to a stricter accounting, was that it?

The Witness: Yes. And I also said that the installation of the time clock was for the benefit of the members of the unit as well as for management, and it gave us a record on which we might be able to stand, and I hoped that it would avoid any possible disputes over hours. [133]

* * *

Trial Examiner: Before the certification of the Union was your practice the same with respect to the matter of keeping time and other personnel practices, as between the various departments?

(No response.)

Trial Examiner: That is, did you have the same system of timekeeping in each department?

The Witness: No, I couldn't say that. The nature of the work has a great deal to do——

Trial Examiner: Well, you did mention that you used the Belo System for the shop, I believe?

The Witness: Yes.

Trial Examiner: So presumably the method of keeping track of earnings there would be a little different from the instances [134] where it was kept on a time basis?

The Witness: Well, yes, it would vary. And the

(Testimony of Philip A. Dufford.)

very nature, as I say, of the work. Salesmen, for instance, who come and go, they don't make so much money sitting around there, so they have to go out. We don't have control of their time——

Trial Examiner: Was it your testimony that the parts department was the only department where compensation was computed on an hourly basis?

The Witness: That would be generally true, Mr. Hemingway. We have some cases where we would have temporary help of some kind which might be engaged on an hourly basis. We had no specific rule, but the functions of the parts department lent themselves to an hourly computation more readily than the other departments.

Trial Examiner: With respect to the other departments, were the supervisors in those departments given any instructions with respect to discontinuing past practices after the Union certification?

The Witness: Not that I know of.

Trial Examiner: How many supervisors would there be in the parts department normally?

The Witness: I believe at the present time that there are three in the supervisory group.

Trial Examiner: Would each one of those have been in a position to have decided, prior to the Union certification, that [135] an employee might receive compensation, even though he was absent? Or was that a decision that was to be made by one particular supervisor?

(Testimony of Philip A. Dufford.)

The Witness: Well, that would be the responsibility of the manager of the department.

Trial Examiner: What is his name?

The Witness: Jess Kight. [136]

* * *

Redirect Examination

By Mr. Nielson:

Q. You testified in reference to a Mr. Fortune being present at the negotiations. Do you know what, specifically, Mr. Fortune's title was with Morrison-Knudsen?

Mr. Smith: I object to that.

Trial Examiner: That is all right for purposes of identification.

A. I don't know his specific title.

Q. (By Mr. Nielson): But you do know that he——

A. (Interrupting): I know that he was engaged in labor relations work.

Q. For the company?

A. For Morrison-Knudsen Company, yes.

Q. Did you ask Mr. Fortune to come into each negotiating [146] meeting as your representative?

A. To which meeting?

Q. To the meeting that you spoke of, at which he was present?

A. Yes, I believe I requested that he attend the meeting.

(Testimony of Philip A. Dufford.)

Q. Did he take part in those meetings, negotiations?

A. He spoke on occasion. He and Mr. Baldwin apparently have known each other for many years and they had many exchanges of conversation.

* * *

Q. Did you rely upon Mr. Fortune and his advice generally in those negotiations?

A. To some extent.

Q. But he was there as your aid and assistant in the negotiations?

A. Better, as an advisor or a consultant. [147]

* * *

ROY F. BUNTIN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: Will you give your full name, please?

The Witness: Roy F. Buntin.

Trial Examiner: And your home address? [148]

The Witness: 4219 Bethel Street, Boise, Idaho.

By Mr. Weil:

Q. By whom are you employed, Mr. Buntin?

A. Intermountain Equipment Company, at Boise.

Q. Where, in what location are you employed?

A. Broadway at Myrtle.

(Testimony of Roy F. Buntin.)

Q. In Boise? A. In Boise.

Q. When were you hired by the company, when did you go to work for them?

A. As nearly as I can recall, it was August 17th, 1948.

Q. In what capacity are you employed?

A. Counterman—was I employed at that time or now?

Q. Yes—I will change that—were you employed at that time.

A. At that time I was employed in the shipping section of the parts department.

Q. Are you still employed in that section?

A. No. I am now a counterman or parts man.

Q. Have you worked for the company regularly since your employ in 1948?

A. Yes, I have.

Q. Have you received bonuses from the company during your employ?

A. I received bonuses from the company, I believe there were four up until 1952.

Trial Examiner: Including or excluding [149] 1952?

The Witness: Including '52?

Q. (By Mr. Weil): How much bonus did you receive in terms of your annual salary? [150]

* * *

A. My bonus approximated one month's basic salary.

Q. (By Mr. Weil): Each year?

(Testimony of Roy F. Buntin.)

A. Each year, except that I might say, the first year, as near as I recall, it must have been, had something to do, the half year that I was there, from August on, I didn't receive as much bonus that year as I did in the following years.

Q. Did you receive a bonus in 1953?

A. No, I did not receive a bonus in 1953.

Q. Prior to the execution of the contract with the Union, with which you are familiar, according to the testimony, were you ever sick? Did you ever lose any time because you were sick while in the employ of the company?

A. I did lose some time from being sick. It would be hard for me to name the exact dates.

Q. Was your pay ever docked because of the time you lost from being sick?

A. I am quite sure that I was never docked during that time for any time that I was off sick.

Q. Since the execution of the contract on July 27, 1953, have you had occasion during which you were off sick?

A. I was off a half a day since that time, during the 1953 contract.

Q. Can you recall when you lost that half day?

A. As near as I recall, it was on or about February 17th.

Q. Were you paid for that day? [151]

Trial Examiner: February 17th of this year?

The Witness: Of 1954, right.

A. Yes—let me—we were still under the '53-

(Testimony of Roy F. Buntin.)

'54 contract, the first Union contract, as I understand it, was during that period.

Q. (By Mr. Weil): Were you paid for that day?

A. No, I was not, for that half day I was not paid.

Q. Did you attend any negotiating meetings between your employer and the Union?

A. Would that be in 1953?

Q. At any time.

A. At any time? Yes, I did.

Q. Did you attend any of the meetings which led to the signing of the contract on July 27, 1953?

A. Yes, I did.

Q. Did you attend all of those meetings?

A. I believe I attended at least four of those meetings, possibly five.

Q. In what capacity did you attend those meetings?

A. As I understand the question, the employees of the company who were in the Union voted to have two representatives sit in on the Union negotiations. Speed Stewart and I were elected as representatives to sit in on that, those negotiations. Maybe representative isn't the proper word, but we were elected to sit in on the hearings, the negotiation hearings. [152]

Q. At those negotiation hearings, or meetings, did you take any part in the negotiations?

A. We might have taken some small part in the discussion.

(Testimony of Roy F. Buntin.)

Q. Generally speaking, who carried the ball for the Union at these meetings?

A. Mr. F. T. Baldwin carried the ball.

Q. That is the same Mr. Baldwin who testified in your presence yesterday?

A. That is the Mr. Baldwin, yes.

Q. Would you tell me, as nearly as you can recall, what took place at these negotiation meetings—first, as to the first meeting that you attended?

A. Would it be necessary to state who was there, what, where the meeting was held?

Q. Yes, state who was there and where the meeting took place.

A. The meeting was held at Intermountain Equipment Company in Boise and those present were Mr. Dufford, Ray Fortune, Mr. Baldwin, and Speed Stewart and myself.

Q. Can you tell me when those meetings took place, when that first meeting took place, the approximate date?

A. I believe it was July 22nd.

Q. Will you tell me, if you recall, what took place, what you recall as taking place at that meeting?

A. As I remember, at that meeting we started off by reading the Union's proposal to the company, making sure that they [153] understood our proposal. There might have been some discussion, but mostly it was just the reading of the proposal at the first meeting.

Q. Were you present at another meeting follow-

(Testimony of Roy F. Buntin.)

ing that? A. Yes, I was.

Q. When?

A. I believe it was the same afternoon.

Q. Were the same persons present?

A. The same persons were present.

Q. What do you recall took place in that meeting?

A. As I recall, we finished reading the proposal during that meeting and there was, we went into discussion on the first items on the contract. As I remember, by the end of that meeting we hadn't agreed on the Union shop or wages or bonus or sick leave. As I remember, the Union shop was discussed rather thoroughly in the second meeting. Mr. Dufford couldn't understand why the employees of the company would want the Union shop. He could see Baldwin's reasons for wanting the Union shop. And I believe at that time that I spoke up and said that we felt that there could be a gradual hiring and firing of employees in the unit over a period of time and soon there would be no Union membership left. However, that was not agreed to in the second meeting, as I remember.

Q. When did you next attend a meeting?

A. Within the next day or two. I couldn't say exactly when [154] the third meeting was, what the date was.

Q. Who was present at this third meeting?

A. The same as the two previous meetings.

Q. Where did it take place?

(Testimony of Roy F. Buntin.)

A. At Intermountain Equipment Company, Boise, Idaho.

Q. Will you tell us what you recall took place at that meeting?

A. As near as I can remember, during the third meeting we got onto wages, sick leave and bonuses. I think probably wages were discussed first. I don't remember what prices were, what wages were arrived at. And I believe sick leave came up next.

Trial Examiner: Do you mean that you settled the wage question?

The Witness: No, I don't mean it was settled. It was discussed. I think probably there was another proposal on wages after this time. It was discussed. Sick leave was also discussed. As I remember, Mr. Dufford took the position that if he paid, if the company paid sick leave to the employees, if it was written in a contract, the employees would feel they were entitled to the sick leave and would take it.

Trial Examiner: You mean whether or not they were sick?

The Witness: Whether or not they were sick, they would feel entitled to it and take it. And I remember Baldwin being in on the discussion. He cited several cases where he knew of companies where sick leave hadn't been taken, at least 100 per [155] cent. Let's see now. As I remember, I don't believe Fortune got into the sick leave discussion, as far as I remember. I believe Baldwin then said that if sick leave was left as it had been previously, understanding that it would be paid if a

(Testimony of Roy F. Buntin.)

person was sick, that he would consider it discrimination, he made a statement there that he would consider it discrimination and would file charges if it would not be paid as it had been in the past.

Trial Examiner: Will you read the full answer, please?

The Witness: Maybe I wandered around a little.

(Answer read.)

Trial Examiner: That is inconsistent there. The first of it needs correcting. Maybe he dropped an "in the" there.

The Witness: I didn't catch that first part. On the last part, it was definitely, Mr. Baldwin definitely brought out that in relation to the other employees, if sick leave wasn't paid, the same to us as it was in relation to the other employees, that he would consider it discriminatory. Does that clear that up now?

Trial Examiner: Yes.

Go ahead. Ask your next question.

Q. (By Mr. Weil): Was there any discussion concerning bonuses at this meeting?

A. Yes. There was some conversation on the bonuses. As I remember, on bonuses, Mr. Dufford took the position that he [156] could not write anything such as a bonus into a contract, that it was entirely up to management whether or not and to whom a bonus would be paid, and he didn't feel that it could be written into a contract, because he

(Testimony of Roy F. Buntin.)

would then be compelled to pay a bonus. As I remember, then Mr. Fortune entered the discussion and stated that Morrison-Knudsen paid their monthly employees a bonus; however, they did not pay their hourly employees a bonus, and, as nearly as I can remember, Mr. Dufford stated that they had never discriminated between the hourly and monthly-salaried employees with respect to bonus. I believe then Baldwin made a similar statement as to what he had on sick leave, with regard to the bonus. He said, as nearly as I can remember, he said, "We will consider it discrimination if you do not continue bonuses as you have in the past or continue to pay the other employees a bonus and not the employees in this unit." As nearly as I can remember, Mr. Dufford said words to the effect that it was not his intention to discriminate against the Union employees. I believe at that time Baldwin asked if we might be excused, and we had a discussion outside the negotiations room. He asked me if I had received a bonus in past years, and I informed him that I had. And, as nearly as I can remember, he asked me if we should take Phil's word on the policy that we had been talking about in the negotiation room, and I stated words to the effect that as far as I know, why, Phil's word was good.

I believe at that time we went back into the negotiation [157] room and discussed, started discussing, wages, as nearly as I can remember. That is all I can recall being said in respect to bonuses and sick leave.

Q. That is all that you recall being said in that

(Testimony of Roy F. Buntin.)

meeting, or is that all that you recall being said in the negotiations about bonuses and sick leave?

A. Let me think a minute.

Trial Examiner: Pardon?

The Witness: Let me think a minute.

A. That is all that I can recall at present.

Q. (By Mr. Weil): During the course of the negotiations, did Mr. Dufford make any statements concerning the company's attitude toward employees who had joined the Union?

A. It was, I believe, brought out during that meeting and possibly in some of the other meetings——

Q. By "that meeting," you mean the third meeting? A. The third meeting.

A. (Continuing): That his attitude toward the Union employees had changed and was not necessarily the attitude that he would have with other employees not included in the Union.

Trial Examiner: Who said that?

The Witness: Mr. Dufford.

A. (Continuing): He may not have said those exact words. As nearly as I can recall, that is what he said.

Trial Examiner: Which meeting was that? [158]

The Witness: The third meeting. However, I believe that was brought out in several of the meetings, that was brought up, that he didn't feel that he had the freedom to deal directly with the employees in the unit like he had with his other employees, since they were in the Union, that he had

(Testimony of Roy F. Buntin.)
to deal with the Union and not directly with the employees, and therefore, his relationship had changed.

Does that answer the question?

Q. (By Mr. Weil): Do you recall if there was any more to his statement than you last stated?

The Witness: May I have that last question read again?

(Question read.)

A. Was that in respect to the relationship between the Union employees and the other employees?

Q. (By Mr. Weil): Yes.

A. The only other statement that I think might have some bearing was the last statement that I spoke of, where he said that he did not intend to discriminate against the Union employees, concerning bonuses or sick leave.

Q. After your caucus, that is, the meeting between yourself, Mr. Stewart and Mr. Baldwin, this other meeting, did Mr. Baldwin in any respect communicate, in your presence, to Mr. Dufford the decision which was reached in that caucus?

Trial Examiner: By "caucus" you are referring to the conversation that took place outside the meeting room? [159]

Mr. Weil: Yes.

A. I can't recall at this time what might have been said after, between Mr. Baldwin and——

Q. (By Mr. Weil): Prior to this meeting out-

(Testimony of Roy F. Buntin.)

side of the room in which negotiations were being carried on, do you recall any dispute between Mr. Baldwin and Mr. Fortune?

A. Yes. There was a dispute. I will try and remember now, if I can, what it was about. I believe it concerns what was brought out yesterday, that, words to the effect that if Fortune wasn't careful, why, Baldwin might be over at M-K's trying to organize their employees.

Q. Do you recall the rest of this conversation?

A. And I believe that Ray Fortune said, as was brought out yesterday, that that was a verbal agreement between Mr. Puckett and himself and that the verbal agreement was no more, as Mr. Puckett was dead. I believe that was Baldwin's reply.

Q. Do you recall anything that followed from there?

A. I believe Fortune then said, indicating Mr. Baldwin in talking with Phil, he said, as near as I can remember: "Well, I will say one thing for this son of a bitch, you can take his word, and I have known Phil for a long time, and the same is true of him."

Q. Was there any more to the conversation, as you recall?

A. That's all I can recall of that conversation.

Q. Do you recall another negotiating meeting after that meeting? [160]

A. Yes, there was another meeting.

Q. Where was that meeting held?

A. That was held at the same place.

(Testimony of Roy F. Buntin.)

Q. With the same parties present?

A. The same parties were present.

Q. And when was it held?

A. And what?

Q. When was it held?

A. It was within a day or two. I couldn't state the exact date now that the meeting was held. It may have been the same afternoon. I believe, though, it was on another day.

Q. Was there any further discussion at this meeting about either sick leave or bonus?

A. I remember the discussions clearer than I do the meetings that they were held in. Actually there's some question in my mind as to whether the discussion I mentioned in the third meeting may have been held in the third meeting or early in the fourth. I believe, as near as I can remember, it was held in the third. However, it could have been held in the fourth meeting. As I remember, the fourth meeting was primarily concerned with the last wage proposal and the Union shop.

Q. Were those issues settled at that meeting?

A. I believe that Mr. Fortune, after some discussion on the Union shop, said to Phil, "Baldwin will never sign the contract until you include that Union shop in it, so you might as well [161] sign it." That is as near as I can remember that conversation.

There was some question through the meetings as to the length of time necessary for a new employee under the Union shop, I believe the company wanted

(Testimony of Roy F. Buntin.)

six months' time, trial, for a new employee, whereas Baldwin wanted 31 days. Now, I believe that in the fourth meeting it was finally agreed that that period would be 60 days.

Q. Do you recall whether the wage issue was settled at that meeting?

A. I believe that in, during the fourth meeting the wages were settled, subject to a vote by the employees, and I believe Mr. Dufford also said that he would have to meet with the Board of Directors.

Q. Did that then conclude the settlement of all issues before the negotiating committees or were there other issues still outstanding?

A. As I understand the question, that concluded all the outstanding issues.

Q. Was a meeting held with the employees by the Union, to your knowledge, to discuss the terms of the, or the results of the negotiations?

A. As near as I can remember, we had a meeting about the same evening to discuss the——

Q. The same?

A. The same clauses to the proposal that had been mentioned [162] during that day.

Q. The same evening as the day of the fourth meeting?

A. The same evening as the day of the fourth meeting.

Q. Did you attend that meeting?

A. Yes, I did.

Q. Can you tell me in terms of members how many of the employees were present?

(Testimony of Roy F. Buntin.)

A. I remember some talk about only one being absent from the meeting. As near as I can recall, there were 13 members in the unit at that time, so if there was one absent, I believe there must have been 12 or so present.

Q. Is that your own recollection?

A. That is my own recollection, there was only one person of the unit employees missing from that meeting.

Q. Was Mr. Baldwin present?

A. Mr. Baldwin was present.

Q. Where was that meeting held?

A. That meeting was held at the former Union hall, it was between Sixth and Seventh on Idaho Street.

Q. As a result of that meeting, the terms of the contract which was written and signed was approved by the membership?

A. Yes, they were. And at one of the meetings there was also some discussion concerning that sick leave and bonus issue.

Q. Were there more than one such meetings?

A. I believe, as near as I can recall, we probably had two [163] meetings of the employees during the negotiations.

Q. Were they held in the same place?

A. I believe they were.

Q. Do you recall who was present at the other meeting, the one other than the one you have already indicated?

A. I don't recall the exact number. I could

(Testimony of Roy F. Buntin.)

probably name a few who were present, but not the exact number.

Q. Do you recall whether it was a well-attended meeting or not?

A. It was a well-attended meeting. Certainly all but two or three, at the most, were present.

Q. Was there a discussion at that meeting of the bonus and sick leave clauses of the proposal?

A. Yes, there was a discussion at that time.

Q. What——

A. (Interrupting): The discussion, as I remember it, was concerned somewhat with the connection between the wages and the bonus.

Q. Did this discussion take place after the third meeting, did this meeting take place after the third negotiation meeting?

A. I believe that that meeting was after the third negotiation meeting.

Q. Did the discussion take into consideration the position which you have stated that your negotiating team had arrived at that third meeting?

A. Yes, there was some discussion, I remember, on the position [164] we had arrived at in the third meeting. I believe, as nearly as I can remember, there was some sort of a vote taken concerning whether or not we should take this sick leave and bonus as Mr. Baldwin understood it to be presented to him, and Speed and I, as it had been presented to the three of us, as we understood it, the people of the unit accepted.

(Testimony of Roy F. Buntin.)

Q. Just what was the proposition which they accepted, if you recall?

A. The proposition, as we understood it and presented it to the unit employees there, was that sick leave and bonuses would be continued as they had been in the past.

Q. How did the vote come out, as you recall?

A. As I remember, the vote was to accept the proposition as we had presented it to the unit employees. And it was rather a large majority.

* * *

Cross-Examination

By Mr. Smith:

Q. On direct examination, Mr. Buntin, you testified that you were hired on about August 17, 1948, is that correct? A. That is correct. [165]

Q. And your first employment with the company was in the shipping section and later in, and at the present you are counterman in the parts department, is that correct? A. That is correct.

Q. And you testified that you had received four bonuses, up to and including 1952?

A. Yes, I did.

Q. That would be for the years 1952, 1951, 1950 and 1949, is that correct?

A. That may be correct as I said it. Now, if I might add a statement here——

Q. All right.

A. I may have given the incorrect number of

(Testimony of Roy F. Buntin.)

bonuses, due to the fact that I did receive a bonus at the year's end in 1948.

Q. You are positive you received bonuses in each of the years '48 through '52, is that correct?

A. Yes, that is correct. Through '52.

Q. Then you did, in fact, receive five bonuses, not four? A. Five bonuses.

Q. How much bonus did you receive in 1952? What was the amount?

A. In dollars and cents?

Q. Yes.

A. I couldn't state the exact amount.

Q. The approximate amount? [166]

A. The approximate amount? Two hundred and —I will say approximately two hundred and seventy.

Q. In each of the five years in question, did you receive approximately that amount of bonus?

A. It would be somewhat smaller in the years preceding that, due to the fact that my salary had been increased somewhat, except the first year. I had only been there several months and apparently the bonus was based somewhat on the time I had been there. I didn't receive as large a bonus in proportion to my year's salary as I did in other years.

Q. In each case, however, it is based on approximately one month's salary?

Trial Examiner: In each case after '48, you mean?

(Testimony of Roy F. Buntin.)

Mr. Smith: Yes, even in '48 for the time worked.

A. Apparently it was.

Q. (By Mr. Smith): You state, Mr. Buntin, that you lost time due to sickness and that prior to the organization of the bargaining unit and prior to the time that you were working under the terms of the 1953 contract. Is that correct?

A. Yes, I did lose some time due to sickness.

Q. At what times and approximately what amount of time were you off work due to sickness in each, at each time?

A. As I remember, approximately the year preceding the contract signing in 1953, I was off approximately three days and, as near as I can remember, it was probably a day at a time. [167] There was no extended sickness anywhere during that period.

Q. And since the period that the '53 contract has been in effect, you have stated that you have been off some time with sickness?

A. Yes, I believe, half a day, I stated.

Q. What was your illness at that time?

A. It was a cold, I believe, as near as I can recall, it was a cold.

Q. What was the date? Would you mind repeating that, please?

A. As nearly as I can remember, I remember going back and checking the date, I believe it was February 17th.

Q. You checked that date?

A. Could I check that date?

(Testimony of Roy F. Buntin.)

Q. I asked you if you checked that date.

A. I checked the time card to see if that was correct.

Q. And that was the right date, after you checked the time card?

A. The date I found was correct. I am not exactly sure about the date, but it was close.

Q. Did you have any other sickness during the period in question, that is, from July 27, 1953, to July 27, 1954, which caused absence from work?

A. Not that I can recall.

Q. Not that you can recall. Did you take time off for any other reason than sickness during that period? [168]

A. Yes, I did take some time off for some other reasons.

Q. Any extended period of time?

A. No. As nearly as I can remember, the time that I took off would be short intervals of time to do important business down town that would require possibly a half-hour, an hour, something like that.

Q. Mr. Buntin, you say that you attended four of the meetings, negotiation meetings, on the 1954 contract. Is that correct?

A. I believe that is correct.

Q. You did not attend all of those meetings?

A. I think there was one meeting, possibly the last meeting, where the contract was signed, that I did not attend.

Q. But you attended all other meetings?

A. That is right.

(Testimony of Roy F. Buntin.)

Q. And the first of these meetings occurred approximately July 22, 1953, is that correct?

A. That is correct.

Q. At this time the Union's proposal was read to the company, in the morning session of that meeting, is that correct? A. That is correct.

Trial Examiner: By whom?

The Witness: I believe that it was read, as I remember, by the company. I might have to think on that a minute.

Q. (By Mr. Smtih): In other words, you believe——

A. (Interrupting): As I remember, there was more than one copy [169] of the proposal at the meeting. As nearly as I can remember, why, some of the proposal was read by the company, some by the Union.

Q. Was this proposal written up by the Union?

A. Well, I presume that it was written by the Union.

Q. What I mean to say, was it presented in written form to the employer at the meeting?

A. That is correct.

Q. And this proposal set out all the terms and conditions that the Union at that time requested of the employer?

A. As far as I can recall, it did contain all the requests.

Q. Do you remember any specific requests, such as a raise in hourly rates of pay?

(Testimony of Roy F. Buntin.)

A. I might not be able to quote the exact amount. However, wages were mentioned in that first proposal.

Q. And—— A. Others.

Q. Do you recall how much you were earning at that time, on the hourly basis?

A. Prior to the negotiations I had been earning approximately, in hourly—on the hourly scale?

Q. Right. A. $1.24 per hour, I believe.

Q. After the agreement—or do you know what increase the Union was asking on your behalf? [170]

A. Could I give you an approximate figure?

Q. Yes.

A. I believe it was a dollar seventy some cents an hour, I believe.

Q. That would be an increase of how much?

Mr. Weill: I think the figures speak for themselves.

The Witness: That would be as close an estimate as I could give you, say, roughly fifty cents.

Trial Examiner: Were you at that time a counterman?

The Witness: I was at that time a counterman.

Q. (By Mr. Smith): You had the same classification you do at the present time, under the contract? A. That is correct.

Q. Even though the terminology might be different—as I understand, it was changed?

Mr. Weill: There has been no testimony of any change.

(Testimony of Roy F. Buntin.)

Mr. Smith: Well, it doesn't matter much anyway.

Q. (By Mr. Smith): Among these proposals, I understand a bonus and sick leave were proposed. Is that correct?

A. Yes, I believe I mentioned that.

Q. What amount of bonus was requested by the Union?

A. As nearly as I can remember, we requested bonuses at first to be paid equivalent to one month's salary.

Q. Did you later change your request?

A. Well, that request may have been modified or understood to [171] be modified later in the meetings, that the bonus would have been paid on the same basis as they had in the past.

Q. What basis was that?

A. Well, that would be, as far as I am concerned, that would be the basis that the older employees there had understood that they received, the equivalent of one month's salary for a bonus each year, that would be assumed that that would be continued.

Q. In other words, your request wasn't changed at all?

A. Basically, I guess the request wasn't changed at all.

Q. It's been the assumption of the Union, or your assumption, that the basis of the bonus was one month's salary, is that correct?

A. That is correct.

Q. And that was in the proposal submitted by the Union in 1953 at the first meeting?

(Testimony of Roy F. Buntin.)

A. As near as I can recall, that was in the proposal, stated in words similar to that.

Q. At that time was a proposal for sick leave read to the employer?

A. There was a proposal on sick leave. I don't know if I can recall exactly what it was. I don't remember if it specified the exact number of days or if it just requested that sick leave be continued as it was. I can't recall how that was specified in the first proposal.

Q. How was sick leave, what was the basis for sick leave? [172]

A. As far as the older employees understood, it was brought out at the Union meetings that as far as the older employees understood, to our knowledge, nobody had ever been docked for sick leave in past years.

Q. Then it was your understanding at that time that if a man were to fall ill and be unable to work, he would be on the payroll of Intermountain Equipment Company indefinitely? In effect, what you are asking, then, is that sick leave, that a man never be docked, you weren't asking for formal sick leave, you were asking simply that a man not be docked for sickness?

A. I don't know if I can answer that or not exactly. I don't remember exactly whether that was the intention of the proposal or not.

Q. You stated before that you proposed that the policy be continued as in the past and that in the opinion of the older men who were in the unit,

(Testimony of Roy F. Buntin.)

their understanding of the policy was that no one would be docked pay for being sick?

A. I believe, I don't know how far the understanding went, but certainly the old employees felt that they could take a day or two off without being sick, that was the understanding.

Trial Examiner: Without being sick?

The Witness: No—with a logical excuse, such as illness.

Trial Examiner: You mean without being docked, then?

The Witness: Without being docked. It might not have extended to an indefinite period. I don't think that any of the [173] older employees assumed they could be off for an indefinite period and still continue to draw their pay.

Q. (By Mr. Smith): What about a definite period?

A. There was such discussion as to days normally included in the sick leave contracts of other companies, and I believe that we may have set a number of days. However, I can't remember what the number of days might have been, whether or not the exact number of days was in the proposal or whether it was simply that sick leave be continued and carried as it had in the past, I can't recall definitely.

Q. At the third meeting, now, when did that occur?

A. I can't remember the exact date of the meeting, other than the first and second. I can't remem-

(Testimony of Roy F. Buntin.)

ber if the third meeting was one day following the first—or it might have been two days—maybe it was the next day. I can't remember the exact date.

Q. And it is in your memory, however, that it was at the third meeting that the issues of wages, bonuses and sick leave were most fully discussed? Is that correct? A. That is correct.

Q. And at that meeting Mr. Fortune did not get into the sick leave discussion, is that correct?

A. Let's see. I believe I stated that Ray Fortune did get into the discussion during one of the meetings.

Q. You did state that Mr. Fortune did not get into the sick leave discussion at the third [174] meeting. A. At the third meeting?

Q. Was Mr. Fortune, in fact, even there?

A. As near as I can remember, Mr. Fortune was present at all the meetings that I was present at. He was present at that third meeting. [175]

* * *

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 2:00 o'clock, p.m.)

Trial Examiner: The hearing is in order.

Mr. Smith was in the process of examining a witness.

Mr. Smith: Would the reporter read the last

(Testimony of Roy F. Buntin.)

question and the answer thereto, that was stated before the recess?

(Question and answer were read as follows:)

"Q. Was Mr. Fortune, in fact, even there?

"A. As near as I can remember, Mr. Fortune was present at all the meetings that I was present at. He was present at that third meeting."

Q. (By Mr. Smith): Mr. Buntin, on direct examination you said that Mr. Dufford's attitude had changed since the Union was certified as the bargaining agent for the unit in question. Is that correct?

* * *

A. Let's see. As I understand it, I said that his attitude changed in respect to the employees in the unit—I believe, yes, [176] his attitude had changed, I believe I testified that way.

Q. (By Mr. Smith): In what respect had Mr. Dufford's attitude changed?

A. As near as I can remember, he said that he could not approach the persons in the unit like he could his other employees or like he could the unit employees before they joined the Union; he had to approach the Union as the bargaining agent, he didn't feel free to approach the employees on a personal basis. Words to that effect.

Q. Would you call such an attitude anti Union?

* * *

A. The general impression I received was that

(Testimony of Roy F. Buntin.)

Mr. Dufford had an unfriendly attitude for some time after the Union was certified. [177]

* * *

Q. (By Mr. Smith): Mr. Buntin, other than the statements you have previously referred to as expressions of Mr. Dufford's attitude—or changed attitude, I should say—did he at any time since certification of the bargaining unit make other statements or expressions which would indicate that his attitude had changed?

A. If I understand this question correctly, that would be after this apparent change of attitude in the third or fourth meeting—is that what you are referring to—or since the absolute certification?

Q. Since the certification.

The Witness: Repeat that question, please.

Trial Examiner: Read the question.

(Question read.)

A. As I understand that, that his attitude might have changed from an unfriendly attitude to a more friendly attitude.

Q. (By Mr. Smith): You say it had changed from an unfriendly attitude to a more friendly attitude?

A. Possibly during the last two sessions of bargaining, there was semblance of a friendly attitude reached.

Q. During bargaining, however, the atmosphere

(Testimony of Roy F. Buntin.)

was unfriendly, during the early stages or first few meetings?

A. Probably the most heated argument came during the third meeting. I don't believe there was any unfriendly argument, possibly, at any other time, and I wouldn't say that that was absolutely unfriendly.

Q. What was that argument concerning?

A. It was concerning the bonus issue, as I remember, the most heated argument concerned the bonus issue.

Q. Subsequent to negotiations and after the contract had been entered into in 1953, did Mr. Dufford take any action or make any statement which reflected an anti-Union attitude?

A. No, I don't believe he made any statement, as I remember, that reflected an unfriendly attitude.

Q. Has Mr. Dufford ever refused to meet with you at your [179] request or with the bargaining unit which you represent, at your request or Mr. Baldwin's request, to your knowledge?

A. No. The meetings might have been delayed sometimes because he wasn't available for some reason, but I don't recall of any meeting being refused.

Q. Has Mr. Dufford, to your knowledge, ever refused to discuss any matter involving the terms or conditions of your employment or the Union contract, with you or with the bargaining unit?

A. Not that I recall.

Q. You state that following the third meeting, or

(Testimony of Roy F. Buntin.)

in the third meeting, Mr. Dufford stated that he would have to meet with his Board of Directors?

A. I was, I believe that I said that was in the fourth meeting, that he said that, I was inclined to believe that was in the fourth meeting.

Q. At the time of the fourth meeting substantially all issues had been decided, is that correct?

A. At the beginning of the fourth meeting?

Q. Yes.

A. As near as I can remember, everything had been settled at the beginning of the fourth meeting, with the exception of the Union shop and wages.

Q. Now, at the end of the third meeting, you had taken the proposals of, or that is, the substantial agreement to the membership of the Union for approval, is that correct? [180]

A. As I remember, after that meeting, we took the proposals, as such, to the members for voting.

Q. Yes. And at that time you discussed sick leave and bonus issues, at that membership meeting?

A. I am quite sure it was at that meeting that we discussed sick leave and bonus.

Q. Was anyone present at that meeting other than members of the Union?

A. No. As I remember, Frank Baldwin—I guess you would consider the Union officials members of the Union.

Q. Yes.

A. No. There wouldn't be anyone there except members of the Union. [181]

* * *

(Testimony of Roy F. Buntin.)

Q. (By Mr. Smith): At the meeting of the membership, following the third negotiation meeting, was the agreement as to wages, or wage increases accepted by the membership, approved by the membership?

A. I can't recall at this time exactly when the wage proposal came in. There were wage proposals went back and forth, of course, but I can't remember wages being discussed at the meeting. They probably were.

Q. At any of the Union membership meetings, at the time of the [182] negotiations, were wages discussed?

A. Yes, they were discussed, very likely at that meeting, but I don't recall definitely that they were discussed at that meeting of the employees.

Q. Were they discussed at the second meeting, which I understand followed the fourth negotiation meeting?

A. I am quite sure that the wages were discussed at that meeting. As I remember, we took a vote, in fact, on the final proposition as it had been presented, something like that.

Q. I see.

A. We took a vote on wages during a meeting of the employees following the fourth negotiating meeting.

Q. Did you take a vote on bonus and sick leave?

A. I believe in the meeting following the third negotiation meeting we took some sort of a vote on bonus and sick leave, as Baldwin and Stewart and I presented it to the employees and as we under-

(Testimony of Roy F. Buntin.)

stood it. I don't remember whether it was a show of hands or what sort of a vote it was, but there was some sort of a vote, I believe. [183]

* * *

Q. Did you at any time from the date your pay check was docked [184] for the time you lost because of sickness make a claim or ask the employer to reimburse you for the amount of sick leave—for that amount of time lost, I should say?

A. No. I don't recall making any claim for that sick leave. As I remember, I mentioned that at some kind of a hearing concerning the N.L.R.B., and I believe they picked up that information.

Q. What hearing was this, Mr. Buntin?

A. I was trying to think. It may not have been a hearing. There was a representative down from Seattle. I can't recall now his name. As I remember we were sitting in the Union office and discussing, possibly, the bonus issue, and the sick leave issue was mentioned.

Q. What time was this, Mr. Buntin, that you mentioned it, that it was mentioned?

A. It was in the evening, I believe it was a meeting we had in the evening.

Q. Approximately what date?

A. I am not sure of the date.

Q. Approximately what month?

A. Even approximately. Well, the approximate month, I will say, was March.

Q. March? A. Thereabouts.

(Testimony of Roy F. Buntin.)

Q. This was the first mention you made of the fact that you [185] had been docked for time you were absent because of sickness?

A. There was one other time it was mentioned. When I got back from being sick—I was off one morning, came to work at noon, and I told the parts department manager, Jess Kight, what had happened and that that should be counted as sick leave.

Q. You made that statement?

A. I made that statement. And he did not disagree with me. So I assumed that it would be counted as sick leave. However, I didn't make any claim, as I remember, at my next pay period.

Q. At the next payday you recognized the fact that you had been docked for time on that day, is that correct? A. Yes, that is correct.

Q. Mr. Buntin, I hand you General Counsel's Exhibit No. 3, which has been admitted into evidence. Would you read——

* * *

Mr. Smith: Article VI, I believe, of that, of General Counsel's Exhibit No. 3, which is the 1953-54 contract. [186]

* * *

A. Yes, I am familiar with that.

Q. (By Mr. Smith): Did you make a claim for payment of wages in accordance with the terms of that paragraph?

(Testimony of Roy F. Buntin.)

A. No, I don't recall making a claim.

Q. Why didn't you make a claim under the provisions of that paragraph?

* * *

A. I don't remember any reason for not filing a complaint.

Q. (By Mr. Smith): Did you honestly believe that under the contract or otherwise you had a claim for wages not paid?

A. I honestly believed I did, even though sick leave wasn't stipulated in the contract, I felt that after negotiations, in fact, I felt when I took that half-day off for sick leave, that I would be paid for it, the same as I had in the past. That is what I honestly felt. [187]

* * *

Trial Examiner: All right.

Are you differentiating a formal claim from talking with somebody about the situation?

The Witness: A formal claim would be a claim in writing or some sort of a legal——

Trial Examiner: All right, let me ask you, then, did you speak to your supervisor or anyone else about the fact that you had been docked and that you thought you ought not to have been docked?

The Witness: I don't believe so. However, I can't honestly say. I don't remember.

Q. (By Mr. Smith): Mr. Buntin, did you at any time request the payment of a bonus from the employer?

(Testimony of Roy F. Buntin.)

Mr. Weil: Objection.

Trial Examiner: Let me see what you are basing that on, what section of the contract. Is that under the grievance section?

Mr. Smith: Yes.

Mr. Nielson: Under Article VI?

Trial Examiner: No, under Article XII, I believe was what he was referring to.

I will overrule the objection. You may answer.

The Witness: May I have the question repeated again? [188]

Q. (By Mr. Smith): Mr. Buntin, did you at any time make a claim for a payment of bonus?

A. Not other than possibly the charge which has been brought to the attention of the Board here.

Trial Examiner: That is, individually, you did not do it?

The Witness: Individually I did not, that I recall, make any claim. [189]

* * *

ALVIN M. STEWART

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your full name?

The Witness: Alvin M. Stewart.

Trial Examiner: And your home address?

The Witness: 2624 Idaho Street.

Trial Examiner: Boise, Idaho?

The Witness: Boise, Idaho.

(Testimony of Alvin M. Stewart.)

Direct Examination

By Mr. Weil:

Q. Have you a nickname, Mr. Stewart?

A. Yes.

Q. What is that? A. "Speed."

Q. Are you the Speed Stewart who has been referred to in this hearing? A. Yes, sir.

Q. Mr. Stewart, are you employed by the respondent, Intermountain Equipment Company?

A. Yes.

Q. When did you first become an employee of that company? A. January 1, 1952.

Q. In what capacity were you then hired by the company? A. Back-order clerk.

Q. Have you been continuously employed by that employer up to [193] the present time?

A. Yes.

Q. Have you been employed in that same capacity during that period? A. Yes.

Q. Have you ever received a bonus from the company? A. Yes.

Q. When?

A. The Christmas season of 1952.

Q. Did you receive one in 1953? A. No.

Q. In terms of your annual wage, how much was the bonus?

A. It was approximately one month's wages.

Q. When you were hired by the company, was the bonus given to you? A. Yes.

(Testimony of Alvin M. Stewart.)

Q. By whom? A. By Mr. Kight.

Q. Where was that?

A. At Intermountain Equipment Company.

Q. Will you tell us what Mr. Kight said and what you said?

A. Well, we had talked and had quite a lengthy discussion as to the wage scale, the hours, and I had made the objection about the wages, that it wasn't very much more than what I had been receiving at my present employer, and with that, Mr. [194] Kight mentioned the bonus and said that they had received it, he had always received it as long as he had been with the company, and that it was equivalent or approximately a month's wages, so that you could actually figure a 13-month year, in pay.

Q. Did you ever have occasion to take off because you were sick prior to the contract in 1953?

A. No.

Q. Have you had occasion since the contract in 1953?

A. Just small periods, I have been off on sick leave, but it was just a matter of 15 minutes, 20 minutes or a half-hour.

Q. Were those small periods frequent?

A. Yes, treatment, doctor's treatment.

Q. Were you paid for any of them?

A. No, but I did not figure the time involved because it was such a small amount of time that I did not——

(Testimony of Alvin M. Stewart.)

Q. How many such periods were there, approximately?

A. Well, it was between the months of, oh, the latter part of August, and it ran until—that was August of '53—and it ran until March of '54.

Q. How frequent were these treatments?

A. Well, at the first of the treatment they were quite frequent, every day, every other day, and up until the last month, two months, why, they was two or three weeks apart, perhaps even a month apart at the last.

Q. Do you have any idea how much actual time you lost as a [195] result of those appointments?

A. No. As I said, I never did keep track. I could approximate the time but it would surely be just a little while.

Q. After the election which was held in your unit did you attend any negotiating sessions?

A. Yes, I was elected by the employees in the unit to sit in on the negotiations and in at the negotiating table.

Q. Did you attend all negotiation sessions, so far as you know?

A. To the best of my knowledge, I attended all meetings.

Q. You have heard the testimony of Mr. Buntin concerning who were present at these meetings?

A. Yes, sir.

Q. Is it your recollection that that testimony was correct? A. Yes, sir.

Q. Specifically as to Mr. Fortune, was Mr. For-

(Testimony of Alvin M. Stewart.)

tune present at each meeting that you were present?

A. Yes.

Q. When were these meetings held, if you recall?

A. Well, I couldn't recall the exact dates, but it was the latter part of July of '53.

Q. Drawing your attention to the first such meeting, will you tell us what took place at that meeting?

A. Well, at the first meeting it was just more or less just a get-acquainted session, it was held in the morning, if I remember correctly, and we discussed our proposition or agreement [196] that we submitted to Mr. Dufford and the company. At that time Mr. Baldwin read the proposals and we tried to cover the whole proposal and explain our position in regards to the proposal, and the morning was just about composed of the reading of the proposal. At the afternoon session, as I remember, we convened at approximately 2:00 o'clock and went into further discussion on the proposal. There was a few items there that was not too clear to Mr. Dufford, as to what our meaning was. I remember one particular phrase in our proposal which called for special privileges, in which Mr. Dufford could not understand what we wanted in regard to special privileges. And we explained that phase of the proposal.

Q. Do you recall anything else that took place at the second meeting? A. The second?

Q. The afternoon meeting.

A. The afternoon meeting, that one session there? Nothing that I can remember that stands out.

(Testimony of Alvin M. Stewart.)

Q. Referring to the third session, can you tell me when that was held?

A. Well, if I remember correctly, our third session followed on the following day or the day after.

Q. Will you tell us what you recall that took place at that session?

A. Well, the third session was just a little bit heavier than [197] the first, in view of the fact that we went through the sick leave clause, the bonus clause, holidays and wages. We had covered quite a—and also the Union shop, I might mention—and the first part of the morning session, as I recall, was, we summarized how we had progressed the day before and then started from there on working out, trying to reach an agreement on sick leave, bonuses and wages. I just want to think a little bit here. Let me see. I can't think of anything.

Q. Do you recall the discussion concerning sick leave?

A. On sick leave, the second session, we just discussed largely at it, in the over-all discussion, in the morning and also in the afternoon, on sick leave. We covered at that meeting largely the over-all and Union shop, if I remember correctly, on the second group of meetings, was the largest discussion, which was held on Union shop, trying to explain the principles and the why and wherefore of the Union shop. And at the later, closing session we did discuss, Mr. Dufford said that our wage scale was too high and he didn't quite understand the structure of our setup on wages, on which we went into quite a

(Testimony of Alvin M. Stewart.)

thorough discussion of the wage scale, and he made the statement that it was a little bit too high, so Mr. Baldwin called Mr. Buntin and myself out for a little talk and we discussed the changes of the wages and coming to an agreement on the wage scale, so we reduced our original demands, which, for the top bracket, was $1.75 per hour. We reduced that to $1.60 per hour and made other changes in the [198] wage scale and went into the meeting again and presented our counterproposal to Mr. Dufford and Mr. Fortune.

Q. What else took place at that meeting, that you recall, if anything?

A. Nothing that I remember took place.

Q. Do you recall another meeting thereafter?

A. Yes, there was another meeting after that date. And in this particular meeting, I remember quite well, because there was quite heated discussions during the course of the meeting which made me well remember the meeting.

Q. Will you tell us what took place and what the discussions were about?

A. The discussions were entirely on sick leave. And on this point of the argument, at this point, I can remember that we had asked Mr. Dufford for, in our proposal, for six or ten days, I do not remember the specified amount, but during the discussion we asked Mr. Dufford why he would not agree to put in the contract the specified amount of days of sick leave. And Mr. Dufford gave the reply that he felt that employees would take advantage of the

(Testimony of Alvin M. Stewart.)

amount of days that we specified in the contract and for that reason he would not like to put it in the contract. But at that time, I am quite sure that I raised the question about sick leave and I recall going along with Mr. Dufford's version of that, because I had known of employees out at Gowen Field that had abused the privilege. And at that [199] point Mr. Dufford said that he was proud that the company, on their, with regard to their sick leave clause, asked if there was any reasons why we wanted it in the contract, if we weren't satisfied with the way the company had handled sick leave in the past. And we said no, that—that is, I had said no, that I hadn't ever taken any sick leave, but it was heard from the other boys in the unit and the company that it was very satisfactory. And Mr. Dufford said that the company was very proud of their sick leave record and the fact is they had one man that had polio and was off for quite some period of time there and he was never docked for sick leave, and that Intermountain Company was very proud of their sick leave record. And at this point, why, Mr. Baldwin asked Mr. Dufford if he would change the policy of the company and Mr. Dufford stated that he did not see anything in the near future that would justify the changing of the policy. And they went, from that discussion we batted it around a little bit and then we went to the bonus clause. And I can remember this point of the argument pretty well because of the heated argu-

(Testimony of Alvin M. Stewart.)

ment that, at the time anyway I thought it was a heated argument, or the language that was used by Mr. Fortune and Mr. Baldwin, whereas we asked Mr. Dufford for his standing on the bonus, which he had told us several times during the previous discussions, that, when we had asked him why he could not put it in the contract, were milder terms than that, and Mr. Dufford stated that if he put it in the contract in black and white he would be committing [200] the company to pay us a bonus, whether or not the company showed any profit the following year or not, and that they would be compelled to pay us in the unit a bonus whether they paid the other employees of the company a bonus or not, and he could not have that in the contract. Whereas, Mr. Baldwin raised the question to Mr. Dufford, if the other members in the unit would be paid a bonus, that the members of our Union would be paid a like bonus or if he didn't, in other words, he would be getting his teat in a wringer and we would call it discrimination. So Mr. Dufford said that he did not see anything in the near future or any reason why the company would not resume the same policy as it had in the past, and that if one employee received a bonus all of them would. And after Mr. Dufford made this remark, Mr. Ray Fortune entered and looked at Mr. Baldwin and said, "You heard what the man said," and Mr. Baldwin looked back over at Mr. Fortune and said, "You'd better be careful, Buster, or I am going to

(Testimony of Alvin M. Stewart.)

go over and knock on your door and organize your shop." And Mr. Fortune said, "You have got a verbal agreement, you son of a bitch, with us, that you wouldn't do that." And Mr. Baldwin said, "That verbal agreement was with Mr. Puckett and when Mr. Puckett died that agreement also died." And Mr. Fortune looked at Mr. Baldwin and pointed across the table to him and said, "That old son of a bitch, you can believe every word he tells you." And he looked vice-versa at Mr. Dufford, pointed to Phil and to Mr. Baldwin and said, "You can also [201] believe everything that Mr. Dufford tells you." So at this point of the discusion, Mr. Baldwin, after a few words, minor words, were said, then Mr. Baldwin asked Mr. Buntin and myself out into the anteroom or room across the hall, at which point he asked me and Mr. Buntin if we believed Mr. Dufford's side of the story, which, me being the younger of the two, I said well, that I didn't know, and so Mr. Buntin said that he had been in the company several years longer than I had, three or four years, some such matter, and that he had always received a bonus and he felt sure that the company would pay the bonuses. Well, with that in mind, I knew I had received a bonus the year before and I told him I thought Mr. Dufford's verbal agreement would be all right. So after we had our little five- or ten-minute conference we went back into the main room and took up the matter of wages. We had submitted a counterproposal to the company for a little reduction in our wage scale, on which the company

(Testimony of Alvin M. Stewart.)

was to act, and if I remember correctly, the company had submitted and come back into the meeting that day with a proposal, proposal on wages that they had drafted, and we were still quite a ways apart on wages. And we had discussed at the last part of the meeting the wage scale and tried to get together and Mr. Baldwin was trying to split the difference and reach an agreement on the wage scale, to which the company submitted to us their counterproposal, and, as I remember, the meeting adjourned for that day, that session.

Q. Was there another meeting which you [202] attended? A. Yes.

Mr. Smith: Would you make your question a little more specific? I am getting confused as to what meetings we are referring to.

Trial Examiner: You were just talking about the second day?

The Witness: A couple of days we had two meetings, and then one day one meeting.

Q. (By Mr. Weil): After this meeting which we have characterized in the past as the third meeting, did you attend the meeting which has been discussed as the fourth meeting?

A. Yes, the fourth meeting, at which agreement was reached on wages, and we cleared up the matter of the Union shop. [203]

* * *

(Testimony of Alvin M. Stewart.)

Cross-Examination

By Mr. Smith:

Q. Mr. Stewart, when you were in the process of being hired by Mr. Kight, you stated that he mentioned payment of a bonus. Is that correct?

A. Yes, sir.

Q. That is correct. And also at that time you state that he mentioned that he had always received approximately one month's salary for a bonus?

A. I did not say that, sir. He said that it would be approximately that.

Q. I see.

A. Not that he had received approximately——

Q. You did say that he had always in the past received one himself?

A. He had always in the past received one himself. [204]

* * *

Q. (By Mr. Smith): Mr. Stewart, you mentioned a special-privileges clause in the first proposal submitted by the Union in the 1953 negotiations. Is that correct? A. Yes.

Q. Would you explain what the special-privileges clause contained in it?

A. Well, if I remember right, we had asked that the employees would not lose any of the special privileges that they now enjoyed with the company.

Q. Such privileges as what? [207]

A. Well, as coffee break, a few of the privileges.

(Testimony of Alvin M. Stewart.)

The boys would maybe take 10 or 15 minutes off to go uptown to the bank, various little—that was largely the ones that we had in mind, that we discussed.

Q. Wasn't the bonus one of these privileges?

A. No, sir.

Q. Or a special concession?

A. No, sir. The bonus was a separate part of the proposal. [208]

* * *

Q. Now, at the third meeting you testified that you had heated discussion on sick leave and the bonus. Is that corect?

A. That is correct. I think I made the statement that it was a rather heated discussion, [209] argument.

* * *

Q. (By Mr. Smith): I understood you to say that Mr. Dufford stated something and Mr. Fortune came through the door and he says, "You can believe that." And then——

Mr. Weil: I have no recollection of that.

Q. (By Mr. Smith): Or Mr. Fortune made some kind of a statement like that and then Mr. Baldwin——

A. That was a discussion between Mr. Baldwin and Mr. Fortune. Mr. Dufford had made the statement about the bonuses.

Q. And what had he said?

A. He had made the statement that he would not change the policy, whereby Mr. Baldwin entered and said, "If you pay one employee a bonus, you

(Testimony of Alvin M. Stewart.)

should pay all employees a bonus. If you neglect the men of our unit, we will call it discrimination." [210] At that point Mr. Fortune stepped in and said, "You heard the man"—that is when he referred to, motioned to Mr. Baldwin and said, "Now the monkey is on your back," at which Mr. Fortune, I mean Mr. Baldwin, corrected him and came back and said, "Well, you so and so, I will be over there knocking on your door, Buster, and organizing you." Is that what you wanted?

Q. That is correct. Well, I am afraid I am a pretty thick man, Mr. Stewart, but that just doesn't sink through my mind.

Trial Examiner: Perhaps you don't know the expression, "the monkey is on his back."

Mr. Smith: Perhaps I don't.

Q. (By Mr. Smith): What does it mean?

A. That means it was Mr. Baldwin's turn to speak, the monkey was on his back, he was being relieved of the argument and Mr. Baldwin was to answer.

Mr. Weil: He had the duty to go forward with the evidence at that time.

Mr. Smith: Thank you.

Q. (By Mr. Smith): And Mr. Baldwin's answer to that was his remark to Mr. Fortune?

A. His remark to Mr. Fortune and Mr. Fortune back to Mr. Baldwin, to Mr. Dufford.

Q. All right. After that story you and Mr. Baldwin and Mr. Buntin left the room and caucused?

(Testimony of Alvin M. Stewart.)

A. Mr. Baldwin and Mr. Buntin and [211] myself.

Q. And at that time Mr. Baldwin asked both you gentlemen if you believed Mr. Dufford?

A. That is right.

Q. Did you at any time, Mr. Stewart, or to your knowledge, Mr. Baldwin or Mr. Buntin, did they at any time come back into the room and say to Mr. Dufford, "I believe you," or words to that effect? A. Not that I can remember.

Q. As a matter of fact, Mr. Stewart, were you at all positive of what Mr. Dufford's statement meant?

A. Yes, because that was the reason for our arguments and our negotiations. We were arguing on these points and they were the main factors we were arguing about at the time of this meeting and our points of discussion of the day.

* * *

Trial Examiner: On the record.

With respect to the time that you lost because of illness between August, 1953, and March, 1954, for which lost time you testified that you were not paid, did you thereafter at any time—when I say "thereafter" I mean any specific absence for which you were not paid—speak to any representative of management, calling attention to the fact that you were not paid? [212]

The Witness: No.

Trial Examiner: And suggesting that you ought to be?

(Testimony of Alvin M. Stewart.)

The Witness: No.

Trial Examiner: Was there any reason that you did not do that?

The Witness: Other than the fact was that the boys had informed me they had not been getting paid for sick leave and mine was in small dribbles, was nothing to the extent of a day or half a day, so I just forgot the matter entirely. [213]

* * *

Mr. Smith: I wish to call Mr. Baldwin under Rule 43 (b).

F. T. BALDWIN

having been previously sworn, resumed the stand and testified further as follows:

Trial Examiner: Your oath covers the entire proceeding, Mr. Baldwin.

The Witness: Yes, sir.

Direct Examination

By Mr. Smith:

Q. You are Mr. Frank Baldwin?

A. That is right.

Q. What is your occupation, Mr. Baldwin?

A. Secretary-treasurer of Local 483, A.F.L.

Q. You are a resident of Boise, Idaho?

A. Yes, sir.

Q. You are the business agent of the charging Union in this [230] case?

A. Secretary-treasurer.

(Testimony of Frank T. Baldwin.)

Q. Secretary-treasurer, yes.

Mr. Baldwin, are you familiar with the provisions of the contract between respondent and the Union, dated July 27, 1953? A. Yes, fairly well.

Q. You testify that you are familiar with the negotiations leading up to the signing of that contract? A. Yes.

Q. As a matter of fact, you were the chief negotiator for the Union in those negotiations?

A. Yes.

Q. In your first proposal to the employer leading up to those negotiations, did you include in that proposal a provision for bonus?

A. As near as I can remember, yes, we did.

Q. And did you include also in that proposal a provision for sick leave?

A. Yes, as near as I can remember, they are both in there.

Q. How many days' sick leave did you request in your proposal?

A. I believe there were six or seven. I am not positive which, now. I think it was six, I believe.

Q. As a matter of fact, didn't you ask for 10 days' sick leave in that proposal?

A. Not to the best of my knowledge. No. However, it could [231] have been that we were discussing the previous practice of the employer as far as sick leave was concerned.

* * *

Q. When were you first notified that sick leave

(Testimony of Frank T. Baldwin.)

had not been paid by the employer to a member or members of the bargaining unit?

A. As near as I can remember, it was after the 1st of the year—that would be 1954.

Q. Approximately what date?

A. Around January the 3rd or 4th, I believe.

Q. Who first notified you that they had not been paid a bonus?

A. Well, it was discussed by some of the employees in our meeting, I believe, is where it first came out on the floor.

Q. Yes?

A. It was some of the employees—I don't remember which one now—after the 1st of the year. It seems as though some employees had lost some time in between Christmas and New Year's. If my memory serves me right, I believe that is when my attention was first called to the sick leave.

Q. You don't recall who that employee [232] was? A. No, I don't now.

Q. Was attention called to sick leave only at that meeting?

A. As near as I can remember, that is right, because we had previously discussed the bonus.

Q. When were you first notified that the bonus had not been paid?

A. Well, that was around the, somewhere previous to this time. It was after, between Christmas and New Year's. I think that the previous practice, if my memory serves me right, the boys had said they were paid after Christmas or immediately

(Testimony of Frank T. Baldwin.)

before Christmas or sometime around Christmas, they had said, I believe, that they received the bonus checks.

Q. They said that they had received them?

A. No, that they had previously received them. It was around Christmastime of each year, previously.

Q. Did you advise these employees, or any group of employees, to take any action with respect to bonus? A. What do you mean by that?

Q. Did you advise them to take any action with respect to nonpayment of bonus?

A. No, other than that the Union would contact the employer.

Q. Did you contact the employer relative to bonus?

A. Well, we had discussed it previously in two meetings with Mr. Dufford. We had two meetings regarding the hours being changed from, let's say Monday morning at 8 o'clock to Monday [233] noon.

Q. Where were these meetings?

A. I don't remember the dates, but they were sometime between the time the contract was signed and December of the same year. We had had two meetings on the hours, changing the hours.

Q. You didn't object prior to that time to the employer not paying bonuses, did you?

A. Well, of course, that was before December 25th, and we didn't know yet.

(Testimony of Frank T. Baldwin.)

Q. After December 25th did you bring this to the employer's attention?

A. On bonuses not being paid or sick leave?

Q. Correct, bonuses.

A. As near as I can remember, we didn't discuss that until the meeting—or it wasn't the meeting—a telephone conversation, as near as I can remember, January 4th, somewhere in there around that date. It wasn't a meeting; it was a telephone conversation.

Q. Did you discuss sick leave during that telephone conversation? A. Yes.

Q. And bonuses, too? A. Yes.

Q. Did you at any time advise any employees in the bargaining unit to submit a claim for wages not paid under the provisions of Article VI of the contract? [234]

* * *

A. No, I did not.

Q. Would you state the reason why you did not?

A. Well, the Union's contention was that it's not covered, bonuses and sick leave was not covered in this agreement, and in the claim for wages, under Article VI would have to be made within 30 days of the day the employee is paid for the period in which wages are claimed, so we would have had to pay them, in my interpretation, every 30 days after the contract was signed until the contract expired.

Q. No claims were made?

A. No, I don't think so.

(Testimony of Frank T. Baldwin.)

Q. Did you advise any employees or did you take action yourself under Article XII of that contract?

A. Article XII is arbitration. No, we did not.

Q. Would you state your reason why you did not?

Mr. Weil: May I have a continuing objection to this line?

Trial Examiner: You may.

A. Well, as I stated in answer to your previous question, it was not covered by the contract.

Q. Would you read the first two lines of Article XII of GC-3 [235] of the contract?

A. Article XII: "Grievances or Disputes. Any employee or group of employees having grievances or disputes"——

Trial Examiner: Don't read it out loud. It's in the record already. Just read it to yourself.

The Witness: I am familiar with it.

Q. (By Mr. Smith): Mr. Baldwin, during July, 1954, did you enter into negotiations with respondent for a contract to cover the period from July 27, 1954, to July 27, 1955? A. Yes, sir.

Q. During these negotiations, did you propose that the respondent should pay sick leave?

A. Yes.

Q. And what disposition was made in the contract as a result of these negotiations as to sick leave?

A. Well, the contract presently in effect now provides for sick leave.

(Testimony of Frank T. Baldwin.)

Q. How many days?

A. If I remember correctly, it's six.

Q. Now, Mr. Baldwin, did you in your proposal, in the 1954 negotiations, propose the payment of bonus by respondent? A. Yes.

Q. What disposition was made of bonus?

A. Well, it's not covered in the agreement.

Q. Do you have an agreement with respondent to pay bonus? [236]

Trial Examiner: You mean a collateral agreement?

Mr. Smith: Collateral agreement.

A. You mean the years 1954-55?

Q. (By Mr. Smith): That is correct.

A. No.

* * *

Q. (By Mr. Smith): In the 1954-55 negotiations, did the Union withdraw their demand for bonus? A. Yes.

Q. Bonuses were, however, discussed during those negotiations? A. Yes.

* * *

Q. Throughout your experience with respondent, have you found respondent willing to bargain with you at all times?

A. I would say yes. [237]

Q. Have you found them generally friendly or unfriendly in attitude toward you?

Mr. Weil: I object.

Trial Examiner: Oh, I think I will allow that.

(Tesetimony of Frank T. Baldwin.)

A. Well, let me inquire please, in your question meaning friendly, how do you mean that "friendly or unfriendly"?

Q. That is, willing to agree to any proposals?

A. Yes, I will agree to that question.

Q. Willing to discuss grievances?

A. As near as I can remember, yes.

Q. Arising from the negotiations in 1953, leading to the contract of July 27, 1953, were you able to secure substantial hourly rate increases for the men in the unit?

A. I think they received a fair increase, yes. I would like to answer that further, but——

Q. No, that is enough. What was the approximation of the amount?

Trial Examiner: You mean percentagewise?

Q. (By Mr. Smith): Well, say, from what figure, the average figure, to what average figure?

A. Well, I don't exactly remember for this reason, they were on a monthly rate of pay of some sort previously, although I think it was based on the hourly rate of pay, but they received their pay once a month. And under the contract that was signed, they were paid by the hour once a month with a drawing period, [238] meaning that they could draw a portion of their money, I believe on the 15th, and the balance on the 31st, so I do not remember the hourly rate of pay that they received, no.

Trial Examiner: This is the '53 contract you are talking about?

(Tesetimony of Frank T. Baldwin.)

Mr. Smith: Yes. [239]

* * *

Q. (By Mr. Smith): You are aware of the fact, if not from your personal experience—well, you are aware of the fact that Mr. Stewart had this infection in his ear which required doctor's care from approximately the latter part of August through the Spring of 1954, weren't you?

A. No, I am not aware of Mr. Stewart's sickness. No.

Q. You did not——

A. (Interrupting): Let me change that. I am now, because he testified about it the other [240] day.

* * *

Mr. Smith: Mr. Dufford, will you take the stand?

PHILIP A. DUFFORD

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

Trial Examiner: You are the same Mr. Dufford who was previously sworn and gave testimony in this hearing?

The Witness: I think so.

Trial Examiner: At least in appearance.

The Witness: Yes.

Q. (By Mr. Smith): What is your occupation, Mr. Dufford?

(Testimony of Philip A. Dufford.)

A. I am general manager of the Intermountain Equipment Company, Boise, Idaho.

Q. What are your duties with the Intermountain Equipment Company?

A. General direction of the Company's affairs as to all phases of the business.

Q. Do your duties include handling of personnel affairs?

A. To some extent, yes, as far as responsibility is concerned.

Q. Mr. Dufford, during the years 1950, '51, '52, did you pay any bonuses to substantially all the employees at Intermountain [241] Equipment Company? A. Yes.

Q. During those years, did you have a set practice or custom in respect to bonuses?

A. No. It was a management matter.

Q. During those years, did you have a set pracpolicy affected in any way by Federal law?

A. There were times during that period when we were governed by regulations of the Wage Stabilization Board and, to the extent of compliance with those regulations, we were regulated or bound by the laws that applied. [242]

* * *

Q. (By Mr. Smith): To the best of your recollection, Mr. Dufford, what was said by the parties to the agreement, or in negotiations, I should say, relative to bonus and sick leave?

Trial Examiner: Try to fix it as to the particular meeting, if you can.

(Testimony of Philip A. Dufford.)

Q. (By Mr. Smith): Mr. Dufford, were there several negotiation meetings? A. Yes.

Q. Bearing these meetings in mind, will you specify at which meetings was there discussion of bonus and sick leave?

A. It's more difficult for me to fix meetings one, two, three, and four, and what seems to have transpired than it has been for the rest of the people. I know that during the course of the negotiations, we discussed these and many other items at length. Considerable discussion was had relative to bonus. It is my recollection that sick leave received strictly a secondary position [244] as far as being an issue. And, of course, as these meetings progressed, final conclusions as to a contract were drawn toward the latter sessions.

Q. During these negotiations, did you have conversations, and what was the nature of these conversations, concerning bonus and sick leave and the disposition of bonus and sick leave?

A. Well, the disposition was that a contract was drawn and signed by both parties, in which reference or provision relative to bonus and sick leave were omitted.

Q. Can you recollect, during these negotiations, did you make any definite statements? Can you remember the wording of any particular statements that you made relative to bonus and sick leave?

A. I can remember the substance of the discussions.

(Testimony of Philip A. Dufford.)

Q. Would you state those, the substances of those discussions?

A. I stated the Company had no set policy regarding payment of bonus and that it was strictly a right of management to, always had been, to determine whether or not bonus would be paid; if paid, paid to whom and how; it was strictly a management proposition, and that, further, that we had never had any written agreement with any employee for the payment of a bonus.

Q. Were wage increases a proposal at these negotiations? A. Yes.

Q. Arising out of these negotiations, did the employees in the Unit receive wage increases? [245]

Yes.

Q. Could you tell us the amount or the average amount of these increases?

A. Will it suffice to give examples?

Q. Examples, yes. A. We had——

Mr. Weil: May I see the documents to which the witness is referring?

Trial Examiner: Are you trying to refresh your recollection here?

The Witness: I just have some work sheets of my own.

Trial Examiner: Don't refer to anything unless counsel draws your attention to it.

The Witness: All right.

A. In the case of—may I point out two examples—in the case of the two witnesses who are employees of Intermountain Equipment, prior to negotiations each of them were receiving an hourly

(Testimony of Philip A. Dufford.)

wage rate of $1.24. After the contract was negotiated, the classification in which they were placed, bearing in mind that we had some new classifications after that to fit Union terminology, these fellows were each increased to $1.50, which is a twenty-six-cent-per-hour increase.

At that time, we had a varying schedule of hourly rates for the people who later became identified with this unit. At the time, I believe there were two employees who had a base rate of [246] $1.10, some who had a rate of $1.14, some who had a rate of $1.24. And those rates had been changed over a period of time to where we had several rates within what became the bargaining unit, prior to the contract.

Trial Examiner: Did they get proportionate raises, then?

The Witness: Yes. I might explain in that contract which you observed there are two breaks in classification. I believe one has a five, and the other has four types of classifications. Everyone remaining in that unit was given increases commensurate with the finally-agreed wage increases.

Q. (By Mr. Smith): As a result of the negotiations in 1953 and the 1953 contract, did the employees in the unit receive other benefits? Would you describe such other benefits as they might have received?

Trial Examiner: Just a minute. You mean, just what does the contract contain, is that your question?

(Testimony of Philip A. Dufford.)

Mr. Smith: Well——

Trial Examiner: The contract, of course, would show what the benefits are.

Q. (By Mr. Smith): Do you have any estimate from the standpoint of money value or the equivalent of wages what other benefits the employees in the unit might have received as a result of these negotiations?

Trial Examiner: Do you understand the question?

The Witness: I think so. [247]

Trial Examiner: I understand what you mean is what was the monetary value of fringe benefits other than just wage increases.

Mr. Smith: Yes.

The Witness: Right.

Trial Examiner: Which they received, which they were not receiving before.

A. As I understand it, which—written into the contract, as specified, were stipulated cost items to the Company, which, of course, were not a part of any written agreement we had before because we had no written agreement. And these items included stipulated paid holidays, specified vacations, wage increases. Using the 40-hour week as a basis for computing the specified additional cost to the Company, the items that were then in the contract would show an increased cost over the old wage rate of amounts, per individual, in excess of $500 per year.

Q. (By Mr. Smith): Were employees of Inter-

(Testimony of Philip A. Dufford.)

mountain, other than those in the bargaining unit, guaranteed such fringe benefits as you have described? A. No.

Q. Does the 1953-54 contract contain provision for paid holidays?

Trial Examiner: It's in evidence. If you want to ask what the practice was before, that might be helpful as to whether or not paid holidays were given.

Q. (By Mr. Smith): Were paid holidays previously given employees [248] in the unit?

A. It was purely an optional matter. They had been, some, at times. It was not by a pre-determined setup or standard.

Q. Prior to 1953, that contract, if a man worked on a holiday, what pay would he have received?

A. Well, it would depend a good deal on the man, his qualification, whatever he was doing.

Q. Say, in the bargaining unit?

A. We paid any of the individuals in our parts department at the rate of time and a half for overtime when we worked them overtime.

Q. Did you pay them a day's pay in addition?

A. That I would have to check on. I am not familiar enough with that detail to be able to tell you right now.

Q. Under the 1953 contract, if a man worked on a holiday, what would you pay him?

A. I believe it calls for time and a half. That is in the exhibit, but we would follow the terms of the contract exactly.

(Testimony of Philip A. Dufford.)

Q. Would he receive payment for the paid holiday in addition to the time and a half for working that day?

A. Well, yes, I think so. That is covered by the contract, and I think that is true.

Q. Employees outside the bargain unit, are they paid for working on holidays?

A. Not necessarily. There is no obligation to do it. Many of [249] employees do work odd hours and on holidays, depending on work load, and they are not always accorded additional compensation.

Q. Did employees outside the bargain unit receive proportionate wage increases with those inside the bargain unit during the years 1953 and 1954?

A. There was no concerted practice in that respect. I assume that during that time there may have been occasional wage revisions outside the unit. However, there was nothing done as a result of the contract at that time.

Trial Examiner: May I clarify that?

I would like to know what you mean by there were wage revisions. Do you mean merit increases or do you mean a general wage or a basic wage increase, Mr. Dufford?

The Witness: Anything that would occur to employees outside the unit would be a merit increase. What I mean—may I——

Trial Examiner: Go ahead and explain it.

The Witness: I think what Mr. Smith asked me was, there, as a result of going into this bargain conference and arriving at a contract, did we turn

(Testimony of Philip A. Dufford.)

around and make blanket increases throughout the rest of the employees. We did not.

Q. (By Mr. Smith): Mr. Dufford, are you familiar with the terms of the 1953-54 contract?

A. Yes.

Q. It is in evidence here at this time. At any time has any employee or any group of employees made a claim for wages under [250] that contract?

A. No.

Q. Has, at any time, the grievance machinery set out in Article XII of the contract been utilized?

A. No.

Q. Have you ever had a request for the grievance machinery in Article XII to be utilized?

A. No.

Q. Have you ever received a written request for payment of wages under Article VI of the contract?

A. No.

Mr. Weil: I assume my countinuing line of objection to that line of testimony still stands?

Trial Examiner: You may have a continuing objection, yes.

Q. (By Mr. Smith): Mr. Dufford, did you enter into negotiations with the Union sometime in July, 1954, for a 1954-55 contract? A. Yes.

Q. Were bonuses and sick leave discussed at these negotiations? A. Yes.

Q. What disposition was made of bonus and sick leave at these negotiations?

A. A sick leave clause is incorporated in our

(Testimony of Philip A. Dufford.)

1954 contract, but there is nothing pertaining to bonus in there.

Q. Can you recall any conversations regarding bonus during these negotiations? [251]

A. I can recall many conversations. They were similar to the ones we had in 1953.

Q. Will you state the substance of such conversations?

A. The substance was that we still considered the payment of bonuses, the matter of the payment of bonuses and the other factors pertaining to bonuses to be matters of management judgment and consideration.

* * *

Cross-Examination

By Mr. Weil:

Q. You have testified that rates of pay [252] prior to the 1953 agreement ranged from $1.10 to $1.24. Is that the complete range?

A. I think not. I would have to consult the record to be able to tell you the complete range and all the rates. I know that those rates were incorporated in there.

Q. Do you know whether the majority of the rates were within those limits?

A. To the best of my knowledge, they were.

Q. Do you know whether there were any rates over $1.24?

A. I don't know that positively right now, no.

(Testimony of Philip A. Dufford.)

Q. And do you know whether there were any under $1.10?

A. I am virtually certain there were none under $1.10.

Q. So there might have been some over $1.24, is that correct?

A. It's possible because—I could give you that answer if you want me to consult the record.

Q. You state that you estimate the money value of the fringe benefits in the contract, or the other benefits, at $500 per annum, is that correct?

A. I said in excess of $500.

Q. Can you break that down?

A. Well, I would have to pick an example. Assuming that an employee was paid $1.24, and assuming that his new rate is $1.50, on a 40-hour week basis, 40 times $1.24 is—whatever it is.

Mr. Neilson: $49.60.

A. Forty times $1.50 is sixty or a difference of $10.40, and [253] over 52 weeks in the year, that gives you obviously over $500.

Q. (By Mr. Weil): Were there any other benefits that cost the Company anything?

A. Every item is something that is stipulated that must be paid, and as written in the contract, part of the cost item, therefore, paid holidays are a cost item; vacations are a cost item.

Q. But did any of these other benefits result in an increased cost to the employer?

A. That I don't know. They are, however, stipulated as things we must pay.

(Testimony of Philip A. Dufford.)

Q. Nevertheless, the question is whether they resulted in an increased cost, and your answer is you don't know? A. That is right.

Q. And, as far as you know, the only increased cost of the employer that you know is that of wages, is that so?

A. I don't think that is true. They are potential items of cost whether or not in practice, which are not; they are stipulated items below which you can't go. In the absence of an agreement, we have a two-way street. This is a one-way street in this one, and those items of cost, whether or not they would result in additional cost in a given year, they are positively items of cost in that way.

Q. Yes, I know, but we are not talking about potentials. We are talking about actualities.

A. Maybe you and I are talking about different things. [254]

Q. This could be. Now, let's talk about what I am talking about, actual costs. As far as you know, were there any other increased costs than the increased cost of wages for the people in the unit?

A. I don't know.

Q. Prior to the execution of the 1953 contract, did your employees receive, or did your employees work on all the holidays? A. Well——

Q. Let me break that down. Did they work on Christmas?

A. No, I don't think so. Maybe some of them did; I don't think so. It isn't customary to work on Christmas.

(Testimony of Philip A. Dufford.)

Q. Was it customary for your employees to work on New Year's Day?

A. That was—most offices are closed on New Year's Day, so ours was closed, also.

Q. Is it customary for your employees to work on the Fourth of July? A. No, absolutely not.

Q. Labor Day?

A. Any holiday, any employee may have had work to do and may have done it.

Q. But was it customary?

A. What we are talking about is places of business are generally considered closed on legal holidays.

Q. I am referring to your place of [255] business.

A. Our place of business was closed. That does not mean that employees could not work and didn't work on some holidays.

Q. Yes, I understand, but I am referring to the custom. It was customary, your place of business was closed on those holidays, is that correct?

A. Certainly, if it is a legal holiday.

Q. How about Memorial Day, was your place of business closed on that day, also?

A. It is a legal holiday. Our business was closed.

Q. And Thanksgiving Day, also?

A. It was a legal holiday: our business was closed then.

Q. When employees worked, prior to 1953, on those holidays, were they paid just straight time?

A. That would depend on the employee and

(Testimony of Philip A. Dufford.)

what classification or which group of employees worked. Some of them undoubtedly worked on holidays and received no additional compensation. Others were paid when they worked under such conditions.

Q. The employees who worked, the employees who are presently in the unit, prior to 1953, if they had been asked to work prior to 1953 on a holiday, if you had an order to get out or get in, would you have paid them straight time?

A. Possibly we would have paid them time and a half. We paid them time and a half for overtime.

Q. Prior to the execution of the 1953 contract, did any of your employees receive any [256] vacations? A. Yes.

Q. Was there a Company policy regarding vacations?

A. There wasn't any specified, set policy. We operated in that as we did most other things, in a very loose manner.

Q. Then, I assume, that there was a custom, is that so?

A. I find it hard to stick to our terminology "custom." We tried to be as lenient as we could with employees, and when conditions permitted, we tried to let them have some time off. There have been times when it was impossible to get a vacation scheduled when we were busy enough to need all hands on deck.

Q. Ordinarily, aside from times which were, during which you were excessively busy, could an

(Testimony of Philip A. Dufford.)

employee consider that he would get a vacation each year?

A. That was a matter handled, as some other matters, principally, between the employees individually and the supervisor of the department.

* * *

Trial Examiner: I think what the question calls for, Mr. Dufford, is on the basis of probabilities. Would an employee [257] be justified in expecting that he might get a vacation each year?

A. He could ask his supervisor for one and, because of that, if he had some time off before and took it up with his supervisor and the time and conditions would permit, he would probably be given consideration again. He would probably get it again.

Q. (By Mr. Weil): Would the employee be able to expect that he would get a vacation?

A. Well, what the employee expected or not, I——

Q. Did the employee get a vacation when he asked for it each year, the usual employee, the average employee? A. I would say generally so.

Q. Generally he did? A. Yes.

Q. How much of a vacation?

A. Those have varied.

Q. Yes, I know. But how much of a vacation would the average employee expect to get, a year? Apparently some employees didn't get any. Apparently there may have been employees who got more.

(Testimony of Philip A. Dufford.)

But I assume the usual employee got a usual vacation, isn't that so? A. I don't think so.

Q. You don't think so? A. No.

Q. Did you hear either Mr. Buntin or Mr. Stewart testify that he received a week's vacation each year? [258]

* * *

A. I don't remember the exact testimony. I remember that both boys testified as to things they had received in the past prior to the Union contract, and certainly I am familiar with the fact that they have had some vacation time.

Q. (By Mr. Weil): It's true, isn't it, that barring extraordinary circumstances, your employees have received a week's vacation each year?

* * *

A. What I said, the fellows down there were in the habit of asking for time off to go hunting for two or three days or to do something else, and those times, if such permission was granted, [259] could vary considerably.

Trial Examiner: Would that not have been in addition to a summer vacation or were they always given time off for short periods throughout the year?

The Witness: That was handled between the men and their supervisors, but it was definitely my understanding that quite frequently they might ask for a day or two off for one reason or another, and,

(Testimony of Philip A. Dufford.)

additionally, they would ask for vacations. They didn't ask me every time this occurred.

Trial Examiner: If I may interrupt just a minute. Talking about time off—I asume I am grounded in that assumption—you are talking about compensated time off, are you? In other words, a paid vacation?

(The witness nods his head affirmatively.)

Trial Examiner: I was just wondering whether time off was paid; it if was a paid vacation or whether it was just time off to go hunting.

The Witness: I think for the most part they were paid for time off although I wouldn't be surprised to find that they were not paid for all their time off. I don't know. I don't know that.

Trial Examiner: Insofar as they got a vacation in the warm period, or a summer period, they were paid, then?

The Witness: That is right.

Q. (By Mr. Weil): You still haven't answered my question. I [260] will rephrase it. Is it or is it not true that customarily, barring abnormal circumstances, an employee received a week's paid vacation each year, the usual employee?

Trial Examiner: In the unit?

Q. (By Mr. Weil): In the unit. All the employees, as a matter of fact.

A. I don't know that positively.

Q. You don't know?

A. There are many things that I look up when

(Testimony of Philip A. Dufford.)

I have to have occasion to find them, that I probably rely on; on things other than my memory.

Q. You don't know that your employees got a week's vacation?

A. I know that it was customary that most of them got a vacation.

Q. You don't know the length of that vacation?

A. Not specifically.

Q. You don't know the customary length of that vacation?

* * *

A. The length has varied.

Q. (By Mr. Weil): Was there a customary length? By that I mean, did most of your employees receive a vacation of a certain length?

A. Of varying lengths. I can't lump them all into one [261] category. I don't know how to do that.

Q. On those employees who were presently in the unit, those employees whose classifications are presently in the unit, did those employees customarily receive a vacation of definite length? Customarily, not invariably, but customarily, that is.

A. Well, customarily they received a vacation, and I assume that it was approximately the same length for each one of them.

Q. Can you tell me what that approximate length was?

A. I have already tried to answer that as well as I know.

Q. Will you answer it now?

(Testimony of Philip A. Dufford.)

A. That it could vary from——

Q. I know it could, but did it?

A. From a few days——

Q. But did it? A. That I don't know.

Trial Examiner: May I ask one question here?

Mr. Weil: Certainly.

Trial Examiner: Excluding office workers, was it the practice to treat all of the other employees approximately on the same basis so far as vacations were concerned?

The Witness: Well, you would have to exclude a lot of people in there, salesmen and various other categories, too, other than office workers. I am saying people in the same category will be treated in the same way, working on adjacent jobs or in the same department, they would undoubtedly be treated in [262] a similar fashion because each of them operated under one supervisor.

Trial Examiner: And employees in the shop, would they have been given approximately the same treatment, so far as vacations are concerned, as people in the tool room?

The Witness: Well, I assume they would. That, again, is a matter of supervisory decision.

Trial Examiner: I would like to ask one more question, also.

Had anyone given the supervisors or the department heads any statement of Company policy with respect to how much paid vacation they could give to the employees?

(Testimony of Philip A. Dufford.)

The Witness: I didn't. I don't think anyone else did.

Trial Examiner: They could give a month's vacation, then, if they saw fit?

The Witness: If they felt a justification for it, I suppose they could. At least there was nothing contrary to it. It would be highly unusual, I suppose.

Q. (By Mr. Weil): Would it be necessary or was it, I should say, necessary prior to the signing of the 1953 contract for the supervisors to check with you before granting a request for a vacation?

A. My only stipulations with supervisors was that if they were going to have people in their department off for any reason at all, that they would try to chart the work load so that the work [263] would go on. And to that extent, when any plans were made, I was apprised of them.

Q. Then you were actually apprised of each vacation that was granted, is that so?

A. I probably was; probably so. If I wanted to refer to any arrangements of that kind. Usually I didn't pay much attention to them, relying on the supervisors to handle such things.

Q. Prior to the 1953 contract, was overtime compensated by any more than ordinary time?

A. Oh, yes.

Q. On what basis?

A. Time and a half. We were governed by other wage regulations, I believe, Wage and Hour Laws and Regulations.

(Testimony of Philip A. Dufford.)

Q. After the 1953 contract was signed, did your other employees—this is using "your employees" under the terms of the Act, of course—than those in the unit receive any raises in pay?

A. There are always changes in schedule in any place where you are trying to run a business, and certainly from time to time, there are changes in pay rates, but I don't know specifically of any right at that time. I am sure there have been changes during the year 1954, '53-'54.

Q. Was there any blanket-paid increase?

A. Not that I am familiar with. For the rest of the employees you mean, outside the unit?

Q. Yes. [264] A. No.

Q. Mr. Dufford, during the negotiations, there has been considerable testimony from you and from other witnesses as to the position of the Company in its willingness to bargain about anything at any time. Has this always been the case?

A. To the best of my knowledge.

* * *

Q. (By Mr. Weil): Prior to the signing of the 1953 contract, is it true that most of the employees worked on the basis of a 47-hour week?

* * *

A. That is true, I think, generally speaking.

Q. (By Mr. Weil): Since the 1953 contract was signed, is it [265] true that most of the employees work a 40-hour week? A. Correct.

(Testimony of Philip A. Dufford.)

Trial Examiner: You mean in the unit or in and out?

Mr. Weil: I meant in the unit.

Trial Examiner: Did you so understand it?

The Witness: I didn't understand that, but it's clarified.

Q. (By Mr. Weil): Let's clarify it further by saying the employees outside the unit, were they cut to 40 hours, too?

A. There was no stipulated cut in their time. The unit was on a 40-hour basis, and certainly the employees had no restrictions on hours—I mean, because they come down and work whenever they have work to do.

Q. I am afraid I don't quite understand your answer. Is it customary now that most of the employees outside of the unit work 40 hours or more?

A. Outside of the unit we have many employees who work, who put in over 50 hours a week. We have no—talking about the people in the unit, we are on a 40-hour basis as a base week. Actually, we were always on a base 40-hour week although we had been working some hours of overtime.

Q. Do I understand——

Trial Examiner: I just wanted to get that straight.

Do you mean that the seven hours above forty always has been overtime?

The Witness: That is right. [266]

Trial Examiner: It was merely that previously

(Testimony of Philip A. Dufford.)

they used to work seven hours on Saturday whereas now they only work through Friday?

The Witness: No, that wasn't quite correct. If I may explain that——

Trial Examiner: I wish you would, yes.

The Witness: Well, we had a work week set up wherein, I believe, that there were four hours, it was three or four hours on Saturday and a half-hour every day because of keeping open a little longer, and——

Trial Examiner: It was an eight and a half hour day, Monday to Friday?

The Witness: Yes. I am just trying to figure out how it came to seven, but I think that's it. I think it was a half-hour every day, every week day, and then Saturday morning.

Q. (By Mr. Neilson): It would actually be 47 and a half hours?

A. For individuals, it may have varied more than that. That is correct. If somebody worked a half-hour under or a half-hour over, it was just as he said, the general period of the work week would amount to 47 hours every week, and we paid seven hours overtime.

Q. (By Mr. Weil): Is the general work period now for all employees about the same?

A. Not for all employees.

Q. Is there a difference between those in the unit and those [267] out of the unit?

A. Those in the unit are on—that's a hard one there. Many people, there are many people outside

(Testimony of Philip A. Dufford.)

the unit who may work more or less than 40 hours. Those in the unit, generally speaking, now, work a 40-hour week. Many of the other employees work a 40-hour week, also.

Q. What determines the amount of work a week, the amount of the work load, or the hours of the shop?

A. Generally speaking, we have many jobs, quite a few outside the unit, that are not routine jobs.

Q. I assume by that that you mean that some people have nonrouting jobs that fluctuate so that they work more and less, is that it?

A. It could be.

Q. But is it? A. Yes, it is.

Q. Would you say that most of the employees outside the unit work over 40 hours a week?

A. I wouldn't say that.

Q. I know, but could you? Would it be true if you did? A. I don't know.

Mr. Weil: That is all.

Q. (By Mr. Neilson): You paid bonuses to substantially all your employees in '50, '51, and '52?

A. Yes. [268]

Q. Did you pay bonuses to substantially all your employees except those in the bargain unit in 1953?

A. Isn't that already in the testimony?

Q. I want a yes or no answer. A. Yes.

Q. Now, when did you decrease the number of hours for employees in the unit from 47 and a half hours to 40?

(Testimony of Philip A. Dufford.)

A. I don't know the exact date. It was sometime approximately a year ago.

Q. Was it near the time of the signing of the '53 contract? A. It was sometime after that.

Q. Was it—by "sometime," could you give us an approximation of the time? A. I don't know.

Q. Would it be a month, two months?

A. I don't know.

* * *

Q. (By Mr. Neilson): Was it approximately the time that the time clock was installed?

A. That I don't know, although I would assume that it would be. [269]

Q. And do you have any recollection as to when the time clock, as a matter of comparison, was installed?

A. No. It wasn't—I couldn't tell you the exact date.

Q. Now, you testified that there was approximately a $500 per employee per year increase by the signing of the new contract. Is that right?

A. I didn't say that.

Q. What did you say?

A. I said that based on the 40-hour week, the difference in pay amounted to that amount.

Q. And that was using the comparison of $1.24 to $1.50, is that correct? A. Correct.

Q. Actually, in cost to the Company, was there any increase in cost per employee by the granting of this increase from $1.24 to $1.50 under this contract?

A. I don't know.

(Testimony of Philip A. Dufford.)

Q. You don't know?

A. My figures will disclose that.

Q. All right, then, let's take the figures. These employees were dropped from 47 and a half to 40 hours, were they not? A. No.

Q. Weren't their hours cut from 47 and a half to 40?

A. I don't think that was 47 and a half anyhow. First I started out with 47. I don't know where the 47 and a half came [270] from.

Q. I was using your own computation.

A. I didn't say 47 and a half.

Q. You said they worked half an hour each day, five days of the week, four hours on——

Trial Examiner: That would be six and a half hours.

A. You aren't going to get me mixed up on these things. I didn't sit there and count the hours. I said 47 was about right.

Q. All right. Let's use your figure 47, then. They were cut from 47 hours to 40, were they not?

A. They weren't cut. We went on a 40-hour week.

Q. What else were they if they weren't cut? They didn't work 47 hours, did they?

A. They received more money for their hours.

Q. They were cut from 47 to 40 hours per week, were they not?

A. They were not cut. We went on a 40-hour week.

Q. Answer my question yes or no.

(Testimony of Philip A. Dufford.)

Trial Examiner: Just a minute, now. There is a difference in terminology. Let's see if I understand the question. Are you asking whether or not the standard work week was reduced from 47 to 40?

Mr. Nielson: That is exactly what I am asking.

A. That is right.

Q. (By Mr. Nielson): Cut?

A. Not cut, but the work week was reduced. [271]

Q. What's the difference—cut, it's a squabble over terminology. Prior to signing this contract, these employees were paid time and a half for overtime, were they not? A. Yes.

Q. Time and a half for each hour worked overtime at $1.24 per hour would be how much? Or let me ask it this way——

A. If you want me to figure it out——

Q. Would it be correct, it's $1.86?

Trial Examiner: $1.86, yes.

A. Whatever it amounted to.

Q. Would those employees in overtime that week earn approximately $13 per week overtime?

A. If that is the way it figured out.

Q. And in 26 weeks—or let me ask it this way, I think you have testified that there would be, at 40 hours per week, 40 hours a week at $1.24 would be $49.60?

A. If that is the correct figure; that is a matter of multiplication.

Trial Examiner: The witness isn't required to do that.

Mr. Nielson: He testified to that before.

(Testimony of Philip A. Dufford.)

The Witness: If it's a matter of multiplication——

Q. (By Mr. Nielson): Actually, weren't these employees on a cost-basis, take-home pay being reduced in wages by the loss of the overtime?

A. This matter of wages was discussed in collective bargaining—— [272]

Q. Answer my question.

Trial Examiner: It seems to me that is calling for a conclusion. In other words, it's something that I could figure out for myself on a comparative basis from the figures I have.

Mr. Smith: There are certainly different bases from which to figure that out.

Trial Examiner: Yes. If I understand counsel's position, it is that employees now on a 40-hour week, get no more and might get less than they formerly got on a 47-hour week.

Mr. Nielson: That is correct.

Trial Examiner: I can figure that out.

Mr. Nielson: It's a computation.

Q. (By Mr. Nielson): And that decrease in the hours went into effect shortly after the contract was signed? A. Yes.

Q. On vacations you testified several times that there was no set policy. Was there any limitation established by the Company as to what an employee could receive as a vacation in a given year?

A. No.

Q. Then, it was more or less a loose arrangement between the employee and his supervisor?

(Testimony of Philip A. Dufford.)

A. Correct.

Q. Was there any limitation on the amount of time that the employee worked there before he could qualify for any given period [273] or any standard such as that?

A. I think that there was a general understanding that a year's time constituted——

Q. The minimum time?

A. Yes, I would say so. That is a little bit a mute question, but I think that is generally true.

Q. Well, let me ask you this, would you generally have a policy of—this is a little bit hypothetical—of employee "A" working there one year, he would be entitled to, say, a week's vacation; after three years, two weeks; fifteen years, three weeks, or would you have any standard such as that?

A. No.

Q. In other words, your vacation, then, was pretty much wide open and broad prior to the time of the signing of the contract?

A. It was a very loose arrangement, yes.

Q. Would this be a correct statement in reference to bonuses, that you paid substantially all your employees a bonus for several years prior to 1950? [274]

* * *

A. How far back do we go on this question?

Q. (By Mr. Nielson): For several years, prior to 1950. A. We have in some years——

Q. (Interrupting): Can you answer the question "yes" or "no," may I ask you that?

(Testimony of Philip A. Dufford.)

A. I would have to go back into the records to find out.

Mr. Smith: I renew my objection to the additional questions inasmuch as counsel has stipulated to the year 1950, '51, and '52.

Trial Examiner: Yes?

Mr. Smith: Inasmuch as there is no allegation in the complaint, going back and covering these years, and inasmuch as there has been no testimony covering these years, you have had your opportunity with Mr. Dufford as an adverse witness.

Trial Examiner: Your objection is that this isn't proper recross-examination?

Mr. Nielson: I can see that it is proper recross-examination. He testified concerning bonuses.

Trial Examiner: Not during that period.

Mr. Smith: During the years, '50, '51, and '52. [275]

Mr. Nielson: He testified as to bonuses being paid for a period of years.

Mr. Smith: '50, '51, and a '52.

Trial Examiner: I think you are talking about the stipulation, that is, that bonuses were paid for several years without regard to particular years. Was it your purpose now just to determine what was meant by "several"?

Mr. Nielson: To find out if it was a continuing policy.

Trial Examiner: Insofar as the witness is able to say from his own knowledge, I will permit him to

(Testimony of Philip A. Dufford.)

answer as to whether or not the practice antedated 1950.

A. I think it antedated 1950, but I can't tell you how far.

Q. (By Mr. Nielson): Would it be an incorrect statement to say for a period of several years or a limited few years or—would there be any generality that you could use?

A. I would rather not make a generality when you ask a question like that. I could find out.

Q. But it did antedate 1950?

A. It antedated 1950.

Q. But you say that the other employees of the Company, outside of the unit, did or did not receive a blanket increase at the time of signing the 1953 contract? A. Yes, I would say they did not.

Q. They did not? A. That is right. [276]

* * *

Trial Examiner: If you feel there is something material, mention it to me, and I will decide whether or not it should go in the record.

The Witness: Well, what I think is not in the record, that I believe should be in the record, is that—it's in our answer to the complaint, however—that I most vigorously deny the existence of any oral agreement. Isn't that something like what you were saying isn't in here?

Trial Examiner: Something, yes, but the point is, whether or not there is an oral agreement, that depends not merely on a person's own state of mind,

(Testimony of Philip A. Dufford.)

but also upon what the several parties in that negotiating meeting may have said whether they intended to say it or not. And it's for that reason that I want to find out just what was said.

Now, specifically, I believe, you were quoted as making the statement that if bonuses were paid to any employees, they would be paid to all. Do you recall having made such a statement as that?

The Witness: I did not make such a statement. [278]

* * *

Mr. Nielson: May we have a continuing objection to the entire line of questioning?

Trial Examiner: Yes, you may.

I wanted to find out whether or not some statement was made, [279] Mr. Dufford, in one of those negotiating meetings which you think might have given the witnesses for the General Counsel the idea that such an understanding was made.

* * *

Trial Examiner: I am asking you whether any statement was made, if not in the words which I previously stated, in some other terminology which related to that general substance. Do you see what I mean?

Mr. Nielson: I have no objection to the rephrased question.

The Witness: Well, I think I do. I could recall the substance of the conversation. I couldn't repeat it word for word.

(Testimony of Philip A. Dufford.)

Trial Examiner: I would like to have you give the substance.

The Witness: I don't believe that at any time during our negotiations did I say anything which could be misconstrued to that extent. Had I been willing to make such a statement I would have been willing to put it in writing or make such an agreement.

Trial Examiner: Well, the point is that you wanted to keep bonuses within the management prerogative?

The Witness: That was. I had no choice. That is the way that we do it.

Trial Examiner: You have also been quoted, I believe, as [280] saying that you did not intend any discrimination against the Union employees or words to that general effect.

The Witness: That is right.

Trial Examiner: How did that come into the conversation?

The Witness: I don't recall the use of the terminology "discrimination" in there in our discussion at all on that subject.

Trial Examiner: You mean on the subject of bonuses?

The Witness: That is right.

Trial Examiner: Do you think it came in somewhere else?

The Witness: I think that probably the word at some time during our negotiations was discussed, but as applied to that particular thing, I certainly

(Testimony of Philip A. Dufford.)

don't recall its ever having been gone into during the discussion.

Trial Examiner: That is the expression of discrimination?

The Witness: Discrimination, yes. In other words, I may be getting far afield as a witness, but it was testified that the conversation leading up to negotiations which resulted in the contract, that Mr. Baldwin said, "Well, if you paid somebody a bonus and don't pay us a bonus, we will consider it discrimination" or words to that effect. I don't think there was any conversations of that kind in our negotiations.

Trial Examiner: Read the third question and answer back.

(Question read.)

Trial Examiner: Referring to the question and answer I just [281] read, I am not sure that you meant that is right that such testimony was given or that is right that you said it. Now, can you clarify that?

The Witness: There was no intended discrimination.

Trial Examiner: But you don't recall having said it?

The Witness: Having said that there wasn't?

Trial Examiner: That there would be none?

The Witness: Well, I guess I will have to go clear back now, again, because I am a little lost there. There was never any intent to discriminate.

(Testimony of Philip A. Dufford.)

Trial Examiner: I am talking about expressed words used in negotiating meetings. When you told me in response to my question there, "That is right," did you mean——

The Witness (Interrupting): I think what you asked me was—I had better have you repeat that question so I will know what you asked me.

Trial Examiner: Read it again.

(Question reread.)

The Witness: Yes, I said that, I think.

Trial Examiner: That is right, you did say it?

The Witness: Possibly not those words, but that meaning.

Trial Examiner: All right, then, if you did say it, do you recall at what stage of the negotiations you said it?

The Witness: It could be all through them, at any stage.

Trial Examiner: You don't recall specific conversations, [282] then, in the negotiating meetings, where you actually included that?

The Witness: No, I don't recall any specific stage. There was a good deal of conversation during all this negotiating.

* * *

Q. (By Mr. Nielson): You said you did not intend to discriminate, or didn't intend any discrimination, against the employees. Now, are you saying that you said that in the conversation or that was your statement of mind?

(Testimony of Philip A. Dufford.)

A. I cannot remember exact conversations back that far. I know that——

Q. (Interrupting): Now, coming back to this again, when you say you did not intend to discriminate against these employees [283] because of their having joined the Union, I assume. Are you saying that was what was said in the negotiations or was that your state of mind?

A. You can call it a state of mind if you want to. I know that on several occasions I was asked questions that purported to inquire into that, and I answered that there was no discrimination intended.

Q. Then, you would say that actually it would be both? You made the statement in negotiations, and it also was a state of mind that you did not intend to discriminate against the employees? Would that be a correct statement?

A. I think that would be a correct statement. I——

Mr. Nielson (Interrupting): That is all I have.

Mr. Weil: I think my memory serves me correctly, but I think I had better ask the witness, if I may.

Q. (By Mr. Weil): What exactly did you say about bonuses, if you recall?

A. That we had no set policy regarding bonuses, that it was strictly the prerogative of management, that we had always handled it that way, and that we had no written bonus arrangement with any employee, and had never had such an arrangement.

(Testimony of Philip A. Dufford.)

Q. Is that all that you said about bonuses or is that all you can recall?

A. I suppose it was all I said. It's specifically the essence of what I said. You can't talk for four or five days on these [284] subjects without many, many words. I don't recall all the words that anyone used.

Mr. Weil: That is all.

Trial Examiner: I have one other question, and I don't know whether this will be subject to your continuing objection or not, Mr. Nielson.

Who was the person or persons who decided who should receive bonuses and how much?

The Witness: Well, that—do you want me to explain some of the mechanics of that sort of thing?

Trial Examiner: Yes, if you will.

The Witness: Ordinarily, we would ask first——

Trial Examiner: Who is we?

The Witness: Well, I would, would ask the supervisors of the department, who was closer to their own men, to his own men, to give me his impression of the work and ability and the attitude and so forth of his employees. And after that time, I had opinions on the matter, I discussed the matter with each one of the supervisors, and then I usually—well, or always, I would say—consulted with Mr. Swenson, who was president of our Company, for his agreement or approval of any agreement that I might make, or any recommendations that I might make. There were several places along the line where this

(Testimony of Philip A. Dufford.)

could be changed by an agreement between two or three parties.

Trial Examiner: Well, whose decision was it in 1953, not [285] to give bonuses to those in the unit?

The Witness: Not to? I would say that was a decision arrived at between Mr. Swenson and myself. We wanted to live up to our contract. We didn't want to violate the contract in any way.

Trial Examiner: Well, when was the decision made?

The Witness: Well, probably sometime during the month of December. We may, at that same time of making decisions, we may have made it, which could be made regarding any employee, toward the end of the year. That is about as close as I can nail that.

* * *

Trial Examiner: From your answer, I think probably the question I had in mind has been inferentially answered. However, I will ask it specifically. Why were the employees in the unit not included in the bonuses that were given in 1953?

The Witness: Because we had a contract of employment with those people by which we guaranteed and had to live by the contract, which bound us to certain terms with those people, such specific binding agreement not existing with the other people, and by the terms of which contract, we could incur considerable expense. Also due to the fact that there was a possibility that payment of a bonus could, under certain sets of circumstances [286] become a

(Testimony of Philip A. Dufford.)

violation of our contract or a violation of the—wait just a minute—that unfair labor charges could be filed against us for conceivably could be filed for payment of a bonus.

Trial Examiner: You mean without taking it up with the Union first?

The Witness: That is true. There were many things there that—— [287]

* * *

ALVIN M. STEWART

a witness called by and on behalf of the Union, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Nielson:

Q. You are the same Stewart who has been previously sworn and testified in this matter?

A. Yes, sir.

Q. You are an employee of Intermountain Equipment Company, are you not?

A. Yes, sir.

Q. Who is your supervisor there?

A. Mr. Jess Kight.

Q. And I think testimony has been elicited heretofore that he is manager or supervisor of the parts department? A. Parts manager.

Q. During that time that you have been employed there, has Mr. Kight been in that same position? A. Yes.

Q. Do you recall an instance of a meeting of the

(Testimony of Alvin M. Stewart.)

employees of [290] the parts department, wherein Mr. Kight addressed them?

A. Yes. We had several meetings, parts department meetings.

* * *

Q. (By Mr. Nielson): I asked you if you recalled a meeting in which Mr. Kight addressed the employees with reference to unionization of the employees? A. Yes, there was a meeting.

Q. Do you remember when it was?

A. Well, sir, the exact date, I can't. It was just shortly after I was employed. I would say the month of February or March of '52. It was just a month and a half to two months after I was employed. [291]

Q. Do you remember who was there or—let me ask you this way. Do you remember how many employees were there, of the parts department?

A. Well, at the time of the meeting, all parts department employees who was working there that day was at the meeting.

Q. Was that held on the company's premises, on company time?

A. Yes, in the parts department offices.

Q. Do you remember what Mr. Kight said, or the substance of what Mr. Kight said in reference to sick leave, bonuses, and other privileges that the employees had, in the event they should join the Union?

A. Well, the gist of it, if I understood his meaning, I was a new employee and did not know too much about what the meeting was brought about

(Testimony of Alvin M. Stewart.)

about, but the gist of the meeting was that he described to the employees what privileges would be taken away from them if they had entered into a contract with the Union.

Q. Did he specifically mention what privileges would be denied them?

A. Well, I remember one, that they would be denied the privilege of going uptown, which special privilege they enjoyed, to cash their checks and various things, such as doctor appointments, that there would be a time clock——

* * *

Received October 11, 1954. [292]

In the United States Court of Appeals
for the Ninth Circuit

No. 15035

INTERMOUNTAIN EQUIPMENT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Rela-

tions Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Intermountain Equipment Company and General Teamsters, Warehousemen and Helpers Local Union 483," the same being known as Case No. 19-CA-948 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken before Trial Examiner James R. Hemingway on September 28, 29, and October 1, 1954, together with exhibits introduced in evidence.

(2) Copy of Trial Examiner's Order Correcting Transcript of Testimony, dated December 6, 1954, together with affidavit of service and United States Post Office return receipts thereof.

(3) Copy of Trial Examiner's Intermediate Report and Recommended Order dated December 8, 1954; Order transferring case to the Board, dated December 8, 1954, together with affidavit of service and United States Post Office return receipts thereof.

(4) Petitioner's[1] exceptions to Intermediate Re-

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[1]Respondent before the Board.

port and Recommended Order, dated January 7, 1955.

(5) Petitioner's motion for order permitting oral argument, dated January 7, 1955 (Denied, see Board's Decision and Order, dated December 16, 1955).

(6) Copy of Decision and Order issued by the National Labor Relations Board on December 16, 1955, together with affidavit of service and United States Post Office return receipts thereof.

(7) Petitioner's motion for reconsideration and request for oral argument, dated January 16, 1956.

(8) Copy of Board's order denying motion for reconsideration and request for oral argument, dated January 26, 1956, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 23rd day of March, 1956.

/s/ FRANK M. KLEILER,
Executive Secretary.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 15035. United States Court of Appeals for the Ninth Circuit. Intermountain Equipment Company, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petition for Review and Petition for Enforcement of Order of the National Labor Relations Board.

Filed March 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Circuit Court and Cause.]

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Intermountain Equipment Company, a corporation, and files its petition pursuant to the provisions of the Labor Management Relations Act of 1947, as amended, (Chapter 20, 61 Stat. 136 et. seq.; 29 U.S.C.A., § 141 et. seq. (1954 Pocket Part)), hereinafter referred to as the Act, for the review of the Decision and Order of the National Labor Relations Board entered in Washington, D. C., on the 16th day of December, 1955, in NLRB Case No. 19-CA-948, ordering and directing that petitioner cease and desist from certain alleged violations of Section 8 (a) (1) and (3) of the Act, and respectfully represents to this Court as follows:

I.

Jurisdiction

That petitioner is a corporation organized and existing under and by virtue of the laws of the state of Idaho, with its principal place of business being at Boise, Idaho.

That respondent National Labor Relations Board, hereinafter referred to as the Board, is an agency of the government of the United States of America,

originally created pursuant to an act of Congress dated July 5, 1935, commonly known as the National Labor Relations Act (Chapter 372, 49 Stat. 451; 29 U.S.C.A. § 153) and continued in existence under the Labor Management Relations Act of 1947, as amended (Chapter 20, 61 Stat. 139; 29 U.S.C.A., § 153 (1954 Pocket Part)); that said Board has an office and a Regional Director located in Seattle, State of Washington, within the Ninth Circuit and within the jurisdiction of this Court; that all of the acts and conduct constituting the alleged unfair labor practices with which petitioner is charged occurred in the state of Idaho within the Ninth Circuit and within the jurisdiction of this Court; that accordingly this Court has jurisdiction to hear this petition by virtue of Section 10 (f) of the Act (29 U.S.C.A. § 160 (f), 1954 Pocket Part):

II.

Statement of Proceedings

(a) Filing of charges: That the General Teamsters, Warehousemen and Helpers, Local 483, hereinafter referred to as the Union, on the 11th day of January, 1954, filed a Charge with the National Labor Relations Board at its Nineteenth Regional Office in Seattle, Washington, and on March 8, 1954, filed an Amended Charge to the effect that your petitioner had engaged and was engaging in unfair labor practices, affecting commerce within the meaning of Section 8 (a) (1), (3) and (5) of the Act.

The charging party was General Teamsters, Warehousemen and Helpers, Local Union 483.

(b) Complaint and its contents: That thereafter on the 7th day of September, 1954, the Board issued its complaint against the petitioner in substance alleging that the Intermountain Equipment Company, the petitioner herein, had engaged in and was engaging in unfair practices affecting commerce within the meaning of Section 8 (a) (1), (3) and (5) and Section 2 (6) and (7) of the Act.

(c) Answer and it contents: That thereafter on the 15th day of September, 1954, petitioner filed its answer, and on September 27, 1954, filed its amended answer admitting that it was a corporation engaged in interstate commerce, but denying generally and specifically the allegations of the complaint charging the petitioner with committing unfair labor practices.

(d) Proceedings before the Trial Examiner: That thereafter a hearing was held on September 28, 29, and October 1, 1954, in Boise, Idaho, before James R. Hemingway, Esq., a Trial Examiner appointed by the Board to hear said cause. Both the petitioner and the Union filed written briefs with the Trial Examiner, and on or about the 8th day of December, 1954, the said James R. Hemingway made and entered his Intermediate Report which he filed with the National Labor Relations Board, wherein he found and concluded that the petitioner had not refused to bargain with the Union within

the meaning of Section 8 (a) (5) of the Act as charged, and he accordingly recommended that the complaint be dismissed as to the refusal to bargain charge. However, he further found and concluded that petitioner had discriminated in regard to terms and conditions of employment of certain of its employees within the meaning of Section 8 (a) (3) of the Act, and recommended certain remedial action therefor.

(e) Order transferring case to National Labor Relations Board: That subsequent to the filing of said report the National Labor Relations Board made and entered its order transferring to and continuing said case before the Board.

(f) Filing objections and brief: That thereafter and on or about the 7th day of January, 1955, this petitioner filed its Exceptions to Intermediate Report and Recommended Order, Findings of Fact, Conclusions of Law, and Recommendations of the Trial Examiner, its Motion for an order permitting Oral Argument, and its written brief in support of its Exceptions. On or about the same time the Union filed its brief in support of the Intermediate Report.

(g) Order and decision of the Board: That thereafter, on the 16th day of December, 1955, the Board by a panel of three of its members, entered its Decision and Order in the above-entitled cause, adopting the findings, conclusions, and recommendations of the Trial Examiner as set forth in his Intermediate Report. Said Decision and Order adopted

and confirmed the finding of the Trial Examiner to the effect that the petitioner had not refused to bargain as alleged, and accordingly the Board dismissed the Complaint insofar as it alleged that petitioner had violated Section 8 (a) (5) of the Act. Petitioner does not seek review of that portion of the Board's Decision and Order.

Said Decision and Order further found and held that petitioner had violated Section 8 (a) (1) and (3) of the Act by discontinuing bonuses and paid sick leave for the employees represented by the Union. This finding and holding was not unanimous, but was a two-to-one decision, the Honorable Boyd Leedom, Chairman, dissenting.

Said Decision and Order required petitioner to cease and desist from certain alleged unfair labor practices, to post the usual notices, to make certain payments to the employees in the bargaining unit, and to notify the Regional Director for the Nineteenth Region of the Board of petitioner's steps to comply therewith.

(h) Motion for reconsideration: That on or about January 16, 1956, petitioner filed a written motion with the Board, seeking reconsideration and an opportunity for oral argument before the entire Board, which motion was summarily denied by the Board on or about the 26th day of January, 1956. Petitioner, in good faith, is expeditiously seeking Court review of the Board's Decision and Order.

III.

Grounds for Review

Petitioner respectfully seeks Court review of said Decision and Order of the Board, upon the following grounds:

1. That insofar as said Decision and Order found this petitioner had violated the Act, said findings, decision, and order are not supported by substantial evidence on the record considered as a whole, and are in fact contrary to the evidence.

2. That insofar as said Decision and Order found this petitioner had violated the Act, said Decision and Order are contrary to law.

3. That the majority opinion of the Board in said Decision and Order is based upon an improper construction and Interpretation of the law.

IV.

Prayer

Wherefore, petitioner petitions this Court for a review of the Decision and Order of the Board dated December 16, 1955, and prays:

1. That a copy of this petition and of the process of this Court be served upon the respondent National Labor Relations Board, as provided by Section 10 (f) of the Act.

2. That the Board be directed and required by an appropriate order of this Court, forthwith, to certify and file with this Court, pursuant to Section

10 (f) of the Act, a transcript of the entire record in the proceedings, including therein the Trial Examiner's Intermediate Report, all exhibits and the originals of all papers filed with the Board from which the complaint was formulated and issued, and the transcript of testimony at the hearing before the Trial Examiner.

3. That this petition for review be preferred and heard and determined expeditiously, as provided in Section 10 (i) of the Act.

4. That the said Decision and Order, and the mandatory and injunctive requirements and provisions thereof as to the petitioner be each and in all respects annulled, vacated, and set aside, except insofar as it dismisses that portion of the complaint alleging that petitioner refused to bargain.

5. That the Board be ordered and directed to dismiss the complaint and proceedings.

6. That the petitioner shall have such other and further relief as may be just and proper in the premises.

Dated this 16th day of February, 1956.

/s/ LOUIS H. CALLISTER,

NATHAN J. FULLMER,
Attorneys for Petitioner.

[Endorsed]: Filed February 17, 1956.

[Title of Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW AND SET ASIDE ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Sec. 151, et seq.), herein called the Act, files this answer to the petition to review and set aside an order issued by the Board against Intermountain Equipment Company, petitioner herein, and the Board's request for enforcement of said order.

1. The Board admits the allegations contained in the portion numbered I of the petition to review.

2. With respect to the allegations contained in the portion numbered II of the petition to review, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings and evidence, of the findings of fact, conclusions of law, and order of the Board, and of all other proceedings had in the matter.

3. The Board denies each and every allegation of error contained in the portion numbered III of the petition to review.

4. Further answering, the Board avers that the proceedings had before it, and the findings of fact,

conclusions of law, and order of the Board, were and are in all respects valid and proper under the Act, and pursuant to Section 10 (e) of the Act, respectfully requests this Honorable Court to enforce said order issued against petitioner on December 16, 1955, in the proceedings designated in the records of the Board as Case No. 19-CA-948, entitled, "Intermountain Equipment Company and General Teamsters, Warehousemen and Helpers Local Union 483."

5. Pursuant to Section 10 (e) and (f) of the Act, the Board has certified and filed with the Court a transcript of the entire record in the proceedings before it.

Wherefore, the Board prays that the Court enter a decree denying the petition to review and enforcing in whole said order of the Board.

Dated at Washington, D. C., this 23rd day of March, 1956.

NATIONAL LABOR RELATIONS BOARD,

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed March 29, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY

1. That the National Labor Relations Board, hereinafter referred to as the Board, erred in find-

ing that petitioner's practices regarding bonuses and sick leave had the inherent effect of discouraging Union membership in violation of Sections 8 (a) (1) and (3) of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, et. seq.), hereinafter referred to as the Act.

2. That the Board erred in finding that the petitioner maintained a practice of compensating its employees for absences due to sickness prior to July 27, 1954.

3. That the Board erred in failing to find that the petitioner at no time evidenced any anti-union motive or feeling.

4. That the Board erred in ordering the petitioner to take certain action to remedy the alleged violations of the Act, including the making whole of petitioner's employees who suffered a loss as the result of nonpayment of the bonuses and sick leave.

LOUIS H. CALLISTER, and
NATHAN J. FULLMER,

THOMAS L. SMITH,
Counsel for Petitioner,

By /s/ NATHAN J. FULLMER.

[Endorsed]: Filed April 2, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINT UPON WHICH THE NATIONAL LABOR RELATIONS BOARD INTENDS TO RELY

Substantial evidence on the record considered as a whole supports the Board's finding that petitioner violated Section 8 (a) (3) and (1) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Sec. 151, et seq.), by withholding from employees within a unit represented by a certified collective bargaining agent bonuses and sick leave payments made to petitioner's unrepresented employees.

Dated at Washington, D. C., this 23rd day of April, 1956.

NATIONAL LABOR RELATIONS BOARD.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed April 28, 1956.